

Exhibit A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

CASA DE MARYLAND, INC., et al.,)

Plaintiffs,)

vs.)

CHAD F. WOLF, et al.,)

Defendants.)

Case Number: 8:20-cv-2118-PX

TRANSCRIPT OF PROCEEDINGS - MOTIONS HEARING
BEFORE THE HONORABLE PAULA XINIS
UNITED STATES DISTRICT JUDGE
FRIDAY, AUGUST 14, 2020; 11:00 A.M.
GREENBELT, MARYLAND

A P P E A R A N C E S

FOR THE PLAINTIFFS:

INTERNATIONAL REFUGEE ASSISTANCE PROJECT
BY: KATHRYN SHU-YENG AUSTIN, ESQUIRE
MARIKO HIROSE, ESQUIRE
ONE BATTERY PARK PLAZA, 4TH FLOOR
NEW YORK, NY 10004
(516) 296-0688
(516) 701-4620

ASYLUM SEEKER ADVOCACY PROJECT
BY: ZACHARY MANFREDI, ESQUIRE
228 PARK AVENUE S. #84810
NEW YORK, NY 10003
(305) 484-9260
(248) 840-0744

Proceedings Recorded by Mechanical Stenography
Produced By Computer-Aided Transcription

MARLENE MARTIN-KERR, RPR, RMR, CRR, FCRR
FEDERAL OFFICIAL COURT REPORTER
6500 CHERRYWOOD LANE, STE 200
GREENBELT, MARYLAND 20770
(301) 344-3499

A P P E A R A N C E S
continued

FOR THE DEFENDANTS:

UNITED STATES ATTORNEY'S OFFICE
DISTRICT OF MARYLAND
BY: JANE ELIZABETH ANDERSEN, ESQUIRE
6500 CHERRYWOOD LANE, SUITE 200
GREENBELT, MARYLAND 20770
(301) 344-4422

1 P R O C E E D I N G S

2 (Call to Order of the Court.)

3 THE COURT: All right. Good morning, everyone.

4 Ms. Smith, if you would call the case.

5 THE COURTROOM DEPUTY: May I have your attention,
6 please.

7 The United States District Court for the District of
8 Maryland is now in session, the Honorable Paula Xinis
9 presiding.

10 The matter now pending before this Court is Civil
11 No. PX-20-2118, Casa de Maryland, Inc., et al., versus Chad F.
12 Wolf, et al. We're here today for the purpose of a motions
13 hearing.

14 Counsel, please identify yourselves for the record.

15 MR. MANFREDI: Zachary Manfredi from the Asylum
16 Seeker Advocacy Project for Plaintiffs, Your Honor.

17 MS. AUSTIN: Kathryn Austin from the International
18 Refugee Assistance Project, also for the plaintiffs.

19 MS. HIROSE: Mariko Hirose from the International
20 Refugee Assistance Project, also for the plaintiffs.

21 Good morning, Your Honor.

22 THE COURT: Anyone else for the plaintiffs before I
23 turn to the government?

24 MS. HIROSE: The three of us will be speaking for the
25 plaintiffs today. Thank you, Your Honor.

1 THE COURT: Okay. All right, great.

2 And then I see you, Ms. Andersen, for the defendants. Is
3 that right?

4 MS. ANDERSEN: Yes. Good morning, Your Honor. Jane
5 Andersen on behalf of the government.

6 THE COURT: All right, great. Thank you.

7 Okay. Thank you all for joining me today. We have a lot
8 to cover, so I expect that we'll be moving this along.

9 A couple of things. I know that we are joined by many
10 members of the public and that I just want to let -- take a few
11 minutes just to go over the rules of the road in that respect.

12 As -- even though this is a virtual hearing, as my
13 background suggests, we are in court. So we will be handling
14 this matter just as if we were in court and that means for
15 those of you who are joining us virtually, you may absolutely
16 stay for the entire time, you're more than welcome, but there
17 are no interruptions of any kind; and just as if there were
18 interruptions in my court, then we would be asking the
19 courtroom deputies to escort you out. So we'll be
20 electronically ejecting anybody who interrupts this proceeding.

21 Secondly, just as if we were in court, there are -- there
22 is no independent recording of this proceeding. So you cannot
23 record this proceeding by audio or video of any kind. Doing so
24 would be a violation of my court order. You could be held in
25 contempt.

1 There is, however, an official court record of today and
2 that is the one taken by Ms. Martin-Kerr, our court reporter.

3 Hi, Ms. Kerr. If you cannot hear us or if at any point
4 we're talking over one another, making your job harder, just
5 let me know and we will stop. Okay?

6 THE COURT REPORTER: Thank you, Judge. Okay.

7 THE COURT: All right, great.

8 And with that, I'm going to start us off with -- oh, the
9 only other thing, we seem to all be doing it, is you keep your
10 phones on mute when you are not speaking so that we cut down on
11 just the background noise of, you know, the barking dogs, the
12 crying babies, the dump trucks rolling by. Although, I do look
13 forward at some point to seeing your pets, because I've seen so
14 many of them, and I feel like I've gotten to know them so well.
15 So if there's a cat that, you know, randomly walks by, it's not
16 a big deal. We'll just keep our phones on mute so that we
17 minimize the background noise.

18 Okay. So with that, we have a number of things. I want
19 to start with -- in the order in which I've received them --
20 the Supplemental Authority, because while I've gotten the
21 notices, I don't quite know for what purposes you've offered
22 them. So I just want to understand why you've given them to
23 me. I have my own thoughts but that's not what I'm really
24 interested in. I want to know what you want.

25 Ms. Andersen, let me start with you. I'm going to start

1 in order of the Supplemental Authority I have received. From
2 you I've received, I think very shortly after the opinion came
3 out, the Fourth Circuit opinion in *CASA de Maryland v. Donald*
4 *J. Trump, et al.* For what purpose are you offering that
5 Supplemental Authority?

6 MS. ANDERSEN: Yes, Your Honor. Thank you.

7 I wanted to make sure the Court was aware of it because it
8 seems to be relevant on a number of different points,
9 potentially, and part of it is just to maybe guide this Court
10 when it may make various decisions, you know, relating to the
11 PI motion.

12 So number one, of course, the court found that CASA de
13 Maryland didn't have organizational standing, but, of course,
14 it found that two individuals did have standing, so ended up
15 ruling on the merits.

16 Here, you know, obviously, I did not raise standing in our
17 proceedings, but, of course, the Court needs to satisfy itself
18 that it has standing for jurisdictional purposes.

19 THE COURT: Let me stop you there. Are you arguing
20 that any of the plaintiffs do not have standing?

21 MS. ANDERSEN: I do believe from that case that
22 organizational standing would be inappropriate; however, they
23 may be able to satisfy membership standing based on the members
24 on membership standing, which that's addressed in that case.

25 THE COURT: Okay. So put organizational standing to

1 the side. Representational standing, are you asserting that
2 they have not adequately pled representational standing based
3 on what I see as somewhat robust averment regarding the members
4 of the organization being injured by the rule changes?

5 MS. ANDERSEN: Not for the purposes of this PI
6 motion, Your Honor. Obviously, we have the right to raise it
7 at a later date if it becomes appropriate. And one of the
8 reasons why I think it is important for this Court's analysis,
9 if we assume that they have membership standing but not
10 organizational standing, goes to irreparable harm; and should
11 this Court enter an injunction, how it could narrowly tailor
12 such an injunction.

13 So I just want to make sure that those concepts are -- I
14 think they are relevant even if this Court finds that there is,
15 you know, membership standing or any other form of --

16 THE COURT: Well, okay, so let me stay on that just a
17 little bit longer. I'm not quite clear what the government
18 means by "not for purposes of this motion" because the concept,
19 as you know, behind standing is the jurisdictional one; and if
20 I don't have power, I don't have power. So if the government
21 is taking the position, well, you have power for now but you
22 might not have power later, it may matter later in the
23 conversation about where this case is going; and so that's why
24 I'm pressing on this.

25 If, Ms. Anderson, if you're saying you're going to be

1 challenging representational standing, I may take that up in a
2 separate way; but, again, that's why I'm pressing on it is I
3 want to understand what the argument would be in light of the
4 way in which the allegations have been pled and the factual
5 averments that have been made.

6 MS. ANDERSEN: Yes, Your Honor. I think that they
7 would likely be able to establish membership standing at least
8 for some of their claims. I only just hesitate because, again,
9 you know, in briefing this in a week, I don't want to preclude
10 any other arguments after consulting with, you know, other
11 people within the Department of Justice if there's other people
12 that have different opinions than I did. So I just didn't want
13 to preclude that.

14 I think it's not a waiveable issue, so I'm aware of that;
15 but, obviously, I would have raised it if I had a strong reason
16 to do so and I did not.

17 THE COURT: Okay. So then before we leave this call
18 today, we might revisit this question.

19 So I understand that for purposes of standing, you've
20 given me this opinion. For what other purposes did you wish
21 for me to review it?

22 MS. ANDERSEN: Yes, Your Honor.

23 The Fourth Circuit also addressed the irreparable harm
24 prong of a preliminary injunction standard, and I think the
25 case stands for the proposition that however -- that it is

1 important when determining what the irreparable harm is.

2 So, for example, there are a number of allegations, both
3 from the declarations and the complaint, about the burden on
4 the organizations themselves, about the resources that they
5 need to divert because of the rules; and I think that case is
6 very clear that those sorts of concerns are not within the
7 Article III standing, which then goes to irreparable harm.

8 So when the Court is balancing the equities of what the
9 harm is, it should be looking at the members in particular in
10 those harms when it's balancing it.

11 I think that the court in that held that CASA's purported
12 injuries were not the product of the rule's dictates but of its
13 own priorities and choices, and that was within the discussion
14 of the irreparable harm prong as well.

15 THE COURT: So it kind of goes hand in glove with
16 standing.

17 MS. ANDERSEN: Yeah, yeah, and that's why, you know,
18 I didn't brief it. It was a very -- standing would have taken
19 up a lot of pages. I was trying to keep within that 35. You
20 know, in hindsight, at least, maybe if I briefed it, just to
21 help frame that issue, that may have been helpful to the Court.
22 So I apologize if that, you know, would have been helpful.

23 But, of course, also this decision came down after that,
24 which I think clarified a lot of things, because the case in a
25 lot of ways is, sort of, you know, similar. So it's helpful

1 from that perspective.

2 And the final factor, which the Fourth Circuit weighed in
3 on, is when you need to weigh the interests between the harms
4 of the plaintiffs and the harms to the government and the
5 public, and there is just -- again, I think it's important for
6 the Court to be aware of and what the court held on those
7 fronts.

8 So just, for example, the court held that the district
9 court's reasoning that an individual's interest must always
10 trump general interest was incorrect; that the government is
11 asserting in that case a significant interest in not burdening
12 the public; and that the government's interest in that sense
13 has to be considered and weighed with the individual harms.

14 THE COURT: Are you talking about the aspect of the
15 ruling that dealt with the propriety of a nationwide
16 injunction, as opposed to more circumscribed relief?

17 MS. ANDERSEN: Well, it was not -- that part of it
18 was just the weighing of whether the irreparable harm prong or
19 the last prong, I guess, of the *Winter's* where you're weighing
20 the plaintiff's harm versus the government's harm or the public
21 interest harm.

22 THE COURT: Okay.

23 MS. ANDERSEN: And the court also just noted that in
24 the field of immigration in particular, that the public
25 interest, you know, can be disturbed when there is a

1 legislative expression, you know, from the legislative branch
2 and from the executive branch, and a court disturbing that; and
3 the court did address that within the weighing of the harms,
4 that the harm of just disturbing the executive branch's
5 discretion, especially in this field where the agency is given
6 very broad discretion, is a harm in and of itself.

7 And so that is one harm that the Court would be required
8 to factor into when weighing all the --

9 THE COURT: Although, it's fair to say -- and we'll
10 get into this more in a moment -- but it's fair to say that the
11 Fourth Circuit opinion didn't have any arguments relating to
12 the authority of the Secretary who will be promulgating these
13 rules. Am I right? There is no FVRA claim.

14 MS. ANDERSEN: Correct. Correct. Yeah, yeah, this
15 really just goes to the APA challenge --

16 THE COURT: Right.

17 MS. ANDERSEN: -- on the merits, yeah.

18 And last, the court, obviously, did talk about, you know,
19 in that case they rejected the nationwide injunction. The
20 court, obviously, discusses why injunction is equitable in
21 nature and that it has to be tailored to address the injury of
22 the particular plaintiff.

23 And, again, this is why I think standing does become
24 relevant in this case even if there is some standing for this
25 Court to, you know, deal with the merits, that it is important.

1 And in this case -- and I can address it now or when we're
2 doing it, but I think there are ways, should this Court find
3 that injunction is appropriate, that it could be narrowed in
4 very reasonable ways.

5 You know, and, again, I think the Fourth Circuit just
6 solidifies --

7 THE COURT: Let me ask you, Ms. Andersen, if you were
8 to take a few more pages and address standing, would you agree
9 that there aren't any -- necessarily any additional facts that
10 you need, that you could address standing based on the
11 pleadings?

12 MS. ANDERSEN: I believe that would be appropriate,
13 Your Honor, yes.

14 THE COURT: Okay. All right.

15 Okay, and I'm intimately aware of the holding regarding
16 national -- a nationwide injunction, and maybe when we get more
17 into the argument today, you can address Judge King's view,
18 which said, in reaching the remedy in that case, it's dicta.

19 But in any event, we'll put that to the side, but I think
20 I understand that you're looking at this case as altering the
21 playing field for standing, irreparable harm, and the scope of
22 relief. Is that fair?

23 MS. ANDERSEN: Yes, Your Honor.

24 THE COURT: Okay, great. Thanks.

25 Okay. And then for the plaintiffs, in the last 24 hours

1 I've received two things; one is an opinion from the Northern
2 District of California regarding the Public Charge Rule. It
3 was a case decided at the -- not on injunctive relief in this
4 opinion but on a 12(b)(1) and 12(b)(6) posture. For what
5 purpose are you offering this case, Plaintiffs?

6 MR. MANFREDI: Yes, Your Honor. Zach Manfredi for
7 Plaintiffs.

8 First, Your Honor, I just wanted to clarify how Plaintiffs
9 have proposed to divide the argument amongst the three of us,
10 if that's helpful for the Court. I'm prepared to discuss the
11 issue surrounding -- related to Mr. Wolf's appointment as
12 Acting DHS Secretary. My colleague Kathryn Austin is prepared
13 to discuss the likelihood of success on the merits for any of
14 our other APA claims; and then my colleague Mariko Hirose is
15 prepared to address any other claims or any other issues in
16 relation to our claims.

17 THE COURT: Okay, great.

18 MR. MANFREDI: So I'm happy to address the *La Clinica*
19 case's relevance as to the appointment issue, and Ms. Hirose
20 can address it as to the standing issue.

21 THE COURT: Okay. So that's helpful because with
22 regard to the question of Acting Secretary Wolf's authority in
23 this respect, *La Clinica* seemed to raise more questions than
24 provided answers, and the subsequent provision of the OAG or
25 the GAO, rather -- I'm dyslexic this morning. I only had three

1 cups of coffee, so excuse me -- seemed to put to bed a
2 lingering factual question I had.

3 So when I read the *La Clinica* case, it seemed to accept as
4 true that President Trump actually nominated Acting Secretary
5 McAleenan and that it accepted that fact as true and based its
6 decision on that, but I hadn't found any authority for that.
7 And then when I -- and it's not pled that way in your
8 complaint. And then the GAO -- government accountability -- I
9 did it right -- the GAO advisory opinion assesses it the same
10 way so that Secretary Nielsen's last memorandum on her way out
11 is the operative document.

12 So it did raise for me were you offering this opinion for
13 any insight as to what I do with the FVRA and the HSA
14 assessment?

15 MR. MANFREDI: Yes, Your Honor.

16 So two points, Your Honor, the first of which is we --
17 first, I mean, we just wanted the Court to be aware since the
18 case did directly address this issue, but we believe the -- the
19 court's opinion there, as well as the GAO report, we do believe
20 strongly supports Plaintiffs' claim that the amendments, which
21 Secretary Nielsen purported to make, never did, in fact, result
22 in secretary -- in Acting Secretary McAleenan lawfully assuming
23 his office. So insofar as that's the case, we believe that
24 it's correct.

25 It is Plaintiffs' view, in fact, that the -- Mr. McAleenan

1 was not actually designated under the FVRA, which we agree with
2 the GAO, that there is an actual -- so we would disagree with
3 that part of the report.

4 But insofar as the Court does potentially even agree with
5 the *La Clinica* court that Mr. McAleenan's appointment was
6 pursuant to the FVRA, rather than the HSA, we think that also
7 strongly supports Plaintiffs' claims because then it would be
8 indisputable that the Vacancies Act's time limit provisions
9 would apply to his appointment; and in this case, it is also
10 very clear that those have been exceeded when the relevant
11 actions were taken.

12 So in that sense, we think it's helpful to the Court in
13 either respect.

14 THE COURT: Okay. Thank you.

15 And so with that, the way I'd like to take up the argument
16 is I actually want to start with the government and talk about
17 the FVRA and the HSA and then I'll turn to Plaintiffs and then
18 we can move on to the APA claims; and the reason why I would
19 like to do it in that order is because if, in fact, I agree
20 that the FVRA provides for sole and exclusive remedy in the
21 event that Acting Secretary Wolf is without authority to
22 promulgate these rules and that sole and exclusive remedy is to
23 set aside -- well, declare the rules as having, quote, no force
24 and effect, that's what the FVRA says, then the rule itself is
25 a nullity whether it is valid or not. And so I have a question

1 about whether I even need to reach the APA claims in that
2 instance.

3 And, Ms. Andersen, I have to say, in reading the GAO
4 opinion, it's certainly not binding on me but it was tracking
5 quite closely what I was thinking about this issue, as stunning
6 as it is, frankly, to imagine that we're at day 500 and we
7 still don't have a secretary installed that is nominated by the
8 President and confirmed by the Senate.

9 So I wanted to give you the floor first to explain to me
10 how it is that I can find otherwise in this case.

11 MS. ANDERSEN: Thank you, Your Honor, and I do
12 appreciate that opportunity.

13 Obviously, this decision just came down this morning, so I
14 just will start off by saying that, you know, the Office of
15 Legal Counsel, Department of Justice needs to review that, and
16 we believe they will come to some sort of, you know, opinion on
17 it, you know, once they have a chance to review it. So I'm
18 sort of in this limbo period right now.

19 But I would like to --

20 THE COURT: Can I ask a question about that before
21 you move on to the merits? Is there a possibility, in
22 reviewing that, that there may be some decision on the
23 government's part to delay enforcement of these rules? In
24 other words, should we check back by the end of the week next
25 week?

1 MS. ANDERSEN: Again, I am told that they will be
2 reviewing it. So my assumption means that that means, you
3 know, they will come to some decision one way or another, if
4 it's something they agree with or disagree with, in which case
5 this case could become moot in theory; but right now that's not
6 the case.

7 So I, you know, would like the opportunity to explain the
8 Department's position --

9 THE COURT: Oh, absolutely.

10 MS. ANDERSEN: Yeah, yeah. And it is a position that
11 they put forward before GAO -- you know, I think just as a
12 general matter, you know, GAO, obviously, served a very
13 important function on behalf of Congress but it is not binding
14 on the executive branch. So there's just always, in any of
15 these cases, that there can be disagreement, and I just don't
16 know yet if there will be, ultimately, once OLC has a chance to
17 review it.

18 THE COURT: Okay.

19 MS. ANDERSEN: So just kind of putting that to the
20 side for now, and I, of course, will update the Court, you
21 know, as soon as I -- if there's any sort of official decision,
22 I will let the Court know because it, obviously, you know,
23 could potentially impact this case.

24 And just to, again, frame sort of what's in dispute and
25 what's not in dispute, this particular case, because it's

1 dealing with Secretary Wolf, if this Court agrees that
2 Secretary Nielsen's order did not change the order of
3 succession, then there's no more argument on behalf of the
4 government. You know, even if the Court adopted the reasoning
5 by the court in Washington that McAleenan was appointed through
6 the FVRA instead, Wolf's appointment would not be proper. So
7 that's just not an issue that the Court would need to resolve.

8 We would concede at that point that our argument would
9 rely on the Court making two findings and the first has to be
10 that Secretary Nielsen's order on April 9th changed the order
11 of succession for all purposes. If you find against the
12 government on that point, the Court does not need to reach any
13 further decisions and that is because Secretary McAleenan
14 signed the order on day 214. So if he was appointed pursuant
15 to the Federal Vacancies Reform Act, he would have exceeded the
16 200-day statutory limitation.

17 The Department's argument is that --

18 THE COURT: Okay, let me make sure I understand it.
19 The government is not disputing that the order -- the changed
20 order of succession signed by Acting Secretary McAleenan was on
21 214 -- day 214 from when the vacancy first came open.

22 MS. ANDERSEN: Yes.

23 THE COURT: Likewise, you're not disputing that the
24 rules in question in this case were promulgated far in excess
25 of the 210-day period that's framed in the FVRA. That's also

1 not in dispute?

2 MS. ANDERSEN: That is correct.

3 The argument and the reason why we believe that Secretary
4 Wolf's appointment is legal is because Secretary McAleenan and
5 Secretary Wolf were appointed pursuant to Section 113 of the
6 Homeland Security Act, which does not contain the 210-day
7 limitation. That would be our second argument that would --
8 that could also address the Court, but the Court doesn't even
9 have to go that far if -- you know, until the Court finds that
10 Secretary Nielsen's order was a lawful and proper order
11 pursuant to the Homeland Security Act.

12 Does that make sense?

13 THE COURT: No. Well, no, I get the two steps. I
14 mean, frankly, I think you can also look at it from the other
15 end of the telescope, which is if I find that I can read the
16 FVRA in harmony with the HSA, meaning I can give every word of
17 both statutes full force and effect, then I could potentially
18 stop at the question of giving the FVRA its full force and
19 effect. It puts a 210-day time limit on acting secretaries.

20 The HSA is designed to help me figure out who slots in
21 under that first 3345(a)(1), who is the first assistant
22 according to that statute. The HSA 113, 6 U.S.C. 113, that
23 helps me figure out who's in there, right? And it could either
24 be by the statutory order of succession, but then if we get to
25 the further order of succession, it tells me I can look to

1 Secretary Nielsen's order, right?

2 So even if I credit your argument that Secretary Nielsen's
3 order didn't -- it is lawful and she did mean to put Acting
4 Secretary McAleenan in, if I can read the statutes in harmony
5 and Acting Secretary Wolf is intending to promulgate these
6 rules at day 499 and day 500 of the vacancy, then don't you
7 lose? And I can just base it on that, that ruling. I don't
8 have to do anything else.

9 MS. ANDERSEN: Yes, Your Honor. Yes, there are two
10 independent legal arguments that the government's argument
11 rests on. So, yes, they're independent. If the Court finds
12 against us on one of them, we would lose. So I guess it's up
13 to the Court which direction it -- you know, what it wants to
14 address first.

15 I think I was thinking about Secretary Nielsen's order
16 first because that came, you know --

17 THE COURT: First in time.

18 MS. ANDERSEN: -- first in time. So kind of
19 everything flows from there.

20 But because of this case, unlike some other cases, like in
21 the Washington case where the court found an alternative route
22 was appropriate, you know, there were different legal issues
23 involved. Those just aren't present here. So I just wanted to
24 make sure that that was clear, that there is no sort of
25 alternative arguments on behalf of the government that, you

1 know, if you find this, you can uphold the rules on these other
2 grounds. There's no alternative grounds. So I just wanted to
3 simplify it the best way possible.

4 THE COURT: So a couple of things in that respect. I
5 do want you to address, give me your best argument, as to why
6 -- because under what you've just said, the only way the
7 government wins is if I find that the HSA totally replaces the
8 FVRA, it eclipses it. I can read no other provisions of the
9 FVRA as having any relevancy in this case. So I want the best
10 argument in that respect.

11 And then, secondly, you are agreeing that unlike the *La*
12 *Clinica* cases, there isn't -- this analysis only falls under
13 the one of three options under the FVRA for determining the
14 order of succession and that is the first, the default. There
15 is no presidential selection of Acting Secretary McAleenan at
16 issue. Am I right about that?

17 Why don't we start with the last one and then --

18 MS. ANDERSEN: I don't know the answer to that
19 because if the President did select him, like the Washington
20 court held, it doesn't matter because then Wolf was not -- we
21 would concede that his order on day 214 -- that the 200-day
22 date would apply for sure. The Court need not reach that. It
23 sort of -- I think that's sort of being worked out as sort of,
24 you know, what should have been the line of succession and how
25 that works out. So I don't want to take a position because I

1 know that's being determined. It's not relevant here
2 because --

3 THE COURT: Okay. And it's not relevant because even
4 if it were true, you would actually deal with it. You would
5 say that if that were true, then at least as it applied to this
6 case, it would mean --

7 MS. ANDERSEN: As applied to Secretary Wolf.

8 THE COURT: -- Chad Wolf -- got it. Okay. All
9 right, then, yeah, let's put that to the side. It doesn't
10 really -- it may or may not matter, though, for purposes of my
11 analysis. So my analysis right now, I see no evidence. I
12 can't take judicial notice of anything right now, unless you
13 tell me otherwise, that the President installed Acting
14 Secretary McAleenan.

15 So the only provision I can look at this under is
16 3345(a)(1). I can't look to the other two that says the
17 President and only the President.

18 So the reason why I care about that is because I do want
19 us, when we talk about the next part of this conversation,
20 which is how does the HSA fully eclipse the FVRA, I just want
21 to make sure we're in the right FVRA box.

22 MS. ANDERSEN: Yes.

23 THE COURT: Okay.

24 MS. ANDERSEN: Absolutely, yes. So it's the
25 government's position that Secretary McAleenan was delegated to

1 the acting role pursuant to 113 of the Homeland Security Act
2 and not pursuant to the Federal Vacancies Reform Act and that's
3 why the 210 days does not apply. So I can walk the Court
4 through that analysis, you know, of why the Court should not
5 incorporate the time limitations that is found in the FVRA into
6 the Homeland Security Act.

7 Is that where you want me to start?

8 THE COURT: I think so.

9 MS. ANDERSEN: Okay. So the FVRA is not the
10 exclusive scheme for acting service when there is an express
11 office-specific statutory provision for succession. And that's
12 found -- that's contained in the express language of the FVRA,
13 Section 3347.

14 And here, Congress did pass an express office-specific
15 statute in the Defense Authorization Act of 2017, which granted
16 the Homeland Security, for the Secretary, the authority to
17 delegate her order of succession, and that's where we turn to
18 Section 113.

19 THE COURT: Okay. Now, before we go there, let's
20 talk about 3347 of the FVRA, because you're saying the
21 authority for me to read the HSA as the exclusive means is that
22 in 3347 there's a carve-out, right, a carve-out for statutes
23 which expressly authorize the President accord, or the head of
24 the executive department, to designate an officer or employee
25 to perform the functions and duties of a specified office.

1 That one?

2 MS. ANDERSEN: Yes, Your Honor.

3 THE COURT: Okay. It goes on to say temporarily in
4 an acting capacity. Right?

5 MS. ANDERSEN: Correct.

6 THE COURT: So what about 6 U.S.C. 113 incorporates
7 temporary or expressly addresses designation temporarily and in
8 an acting capacity? I get the acting capacity part. So maybe
9 I'm really focused on the temporarily part.

10 MS. ANDERSEN: Absolutely, Your Honor.

11 The government acknowledges that any position for any
12 acting service would necessarily have to be temporary. What
13 the disagreement over is what does "temporary" mean and whether
14 210 days is some magic number or not. And Congress, of course,
15 when they passed Section 113 in the Homeland Security Act, they
16 could have included a number. It could have been 200 days; it
17 could have been something different, but they intentionally did
18 not include a number.

19 And, again, these two statutes, I think the plaintiffs are
20 trying to frame it that there's no conflict, but I think the
21 proper analysis is that these are two statutes that
22 cross-reference each other. They're both clearly aware of each
23 other and, therefore, in the Federal Vacancies Rule Act
24 statute, which specifically designates, you know, particular --
25 like, who exactly the 210-day limitation applies to.

1 So, again, if you look in Section 3346, it specifically
2 says the person serving as an acting officer, as described
3 under Section 3345 -- and, of course, Section 3345 has three
4 people, you know, three sort of groups for somebody to serve as
5 an acting, which is different. You know, Congress could have
6 said --

7 THE COURT: Well, it's different and then it isn't.
8 I mean, that's why I wanted us to first make sure we're talking
9 about the right provision. Right? Because in this case, we're
10 in 3345(a)(1), right? And so when we go there --

11 MS. ANDERSEN: I think I disagree. We're not in -- I
12 do not agree that we're in 3345(a)(1).

13 THE COURT: Okay, then are we in (a)(2) or (a)(3)?

14 MS. ANDERSEN: Your Honor, I don't believe we're in
15 any of that.

16 THE COURT: Here's why I ask that -- well, I guess
17 here's why I ask that, because -- let's do it this way. If you
18 pull up 113 and you look at 113, there is a very important part
19 in the beginning which locks very well with the FVRA. So it
20 can't be that Congress intended for the HSA to eclipse the
21 FVRA. This is how I read it, at least.

22 Look at the first provision, (a)(1). It says, "Except as
23 provided under paragraph (2), there are the following officers,
24 appointed by the President, by and with the advice and consent
25 of the Senate." And the first one is the Deputy Secretary of

1 Homeland Security, who shall be the first assistant for
2 purposes of subchapter III, chapter 33, of title 5. That's the
3 FVRA, right? And then you go down and they do the same thing
4 for the Under Secretary of Management.

5 So Congress knows how to write this statute so it fits --
6 right? -- with the FVRA. The reason why that is important is
7 because it goes on then to give us, when you read it side by
8 side with 3345 -- right? -- it gives us who should then be
9 plugged in, under 3345(a)(1), as the first assistant. Right?
10 I mean, that's the whole purpose.

11 Go back to 113(a)(1)(A). "A Deputy Secretary of Homeland
12 Security, who shall be the Secretary's first assistant for
13 purposes of subchapter III, chapter 33 of title 5." So for
14 purposes of the FVRA, which uses the term "first assistant,"
15 the HSA gives us who this person is. So with that, just don't
16 go any further from there, how can I read the HSA as eclipsing
17 the FVRA, replacing the FVRA?

18 MS. ANDERSEN: Yes, Your Honor.

19 Again, I'm not trying to say it eclipses it. I think they
20 are read together, in conjunction, and there are certain
21 provisions that refer to each other and that directs everybody
22 to know when they do overlap; and then the sections that do not
23 refer to each other are exclusive and do not conflict.

24 So in Section 113(a)(1)(A), for example, that is talking
25 -- that's talking about the language. So I think where in the

1 Vacancies Act, they refer to the position as first assistant --

2 THE COURT: Right.

3 MS. ANDERSEN: -- and in the Homeland Security, that
4 person is the Deputy Secretary.

5 But Secretary McAleenan wasn't serving as Deputy Secretary
6 of Homeland Security or the Under Secretary. That's not the
7 order of succession.

8 THE COURT: Right.

9 MS. ANDERSEN: Those positions were vacant.

10 THE COURT: Right.

11 MS. ANDERSEN: So that's when we turn to 3347, which,
12 you know, specifically says that Sections 3345, which is what
13 the Court was referring to, are the exclusive means unless --
14 so I think that "unless" is what's important -- unless a
15 statutory provision expressly, you know, authorizes --

16 THE COURT: Right. And then acting in a temporary
17 basis.

18 MS. ANDERSEN: Right, right.

19 THE COURT: That's the part, though -- where is the
20 express replacement for this FVRA? So, in other words --
21 because there's these officer statutes for every agency, right?
22 They say something slightly different but every agency has:
23 Here's the officer that has all of the -- is at the top.
24 Here's the top banana officer. For us that's 112. Then we
25 have the second banana, third banana, fourth banana, and

1 that's, for us, 113. And every agency kind-of, sort-of has
2 this.

3 So if I read it as broadly as you're suggesting, I do run
4 the risk that the FVRA is kind of, you know, written out of its
5 utility; but not even going that far, where do I see expressly
6 in 6 U.S.C. 113 that Congress meant for this provision to be
7 the exclusive means and not the FVRA?

8 MS. ANDERSEN: Again, if you turn to Section 113(g),
9 which specifically deals with vacancies --

10 THE COURT: Okay. I'm there.

11 MS. ANDERSEN: So it's (g)(2). It states,
12 "Notwithstanding chapter 33 of title 5," which is the Federal
13 Vacancies Reform Act, "the Secretary may designate" --

14 THE COURT: Wait-wait-wait-wait, wait-wait-wait-wait.
15 Stop there. I want to stop you on that one because now the
16 part at the top is really, really important. Right? Because
17 the part at the top, when Congress meant to identify the
18 Federal Vacancies Reform Act, they said subchapter III of
19 chapter 33 of title 5. That's the FVRA.

20 Chapter 33 of title 5 -- and this is my word. You all can
21 tell me what it's really supposed to be called, but it's the
22 larger civil service statute. Right? It's got all of these
23 different provisions about qualifications and how you can get
24 installed and how you can get removed. And I won't -- I don't
25 want to go through the whole thing with you, but the point

1 being is that I can't agree with your reading on it saying
2 "notwithstanding chapter 33 of title 5" means the FVRA.

3 How do you respond to that difference between how they
4 refer to subchapter III in the first section and they don't
5 refer to it in (g)(2)?

6 MS. ANDERSEN: I mean, I believe that it's contained
7 within that chapter. Correct? So it's a broader statement but
8 it incorporates the Federal Vacancies Reform Act.

9 THE COURT: But how can I find that that's an express
10 replacement of the Federal Vacancies Reform Act? Because, this
11 is -- you know, again, if I'm trying to read everything so that
12 I give every word in the statute, under that cannon of
13 statutory construction, that Congress knows what they have
14 already passed when they pass something new, how do I know that
15 what they meant to do here, again, is eclipse the FVRA when
16 they cite the entire sort of civil service statute?

17 And they know how to cite the FVRA in other places because
18 if you go to the next section, actually, very specifically when
19 they don't mean the entire section, they mean 3345 and 3349(b),
20 Congress knew how to cite those directly.

21 So that's why I'm having a very hard time finding that
22 6:113 replaces the FVRA and I'm not to look to any other
23 provisions in it.

24 MS. ANDERSEN: Again, I don't necessarily want to say
25 it replaces it, but this definitely gives authority to the

1 Secretary to designate such other officers.

2 THE COURT: Okay.

3 MS. ANDERSEN: It's a limited category than the FVRA.
4 So it's saying the Secretary has this authority. It's a more
5 limited group of people that that person can choose from.

6 And, again, because I think these statutes should be read
7 together because they do cross-reference each other. Because
8 the FVRA is very specific about who the 210 days applies to,
9 and the Homeland Security Act was passed after the FVRA.
10 Congress would absolutely know how to put in paragraph (g)(2)
11 because, to Your Honor's point, it references it clearly within
12 the Homeland Security Act when it wants to. And it could have
13 said subject to the limitations in Section 3347 and it did not
14 do that, where the Vacancies Reform Act, you know -- again, it
15 doesn't say all vacancies. It's like a limited subset of
16 vacancies that it applies to.

17 And this group of individuals, which is the Secretary from
18 other offices within the department, is a different subset of
19 individuals that the Secretary can choose from than what is
20 found in the Federal Vacancies Reform Act.

21 THE COURT: So if I credit that argument that the HSA
22 does provide a -- your word -- a "subset," my word maybe
23 "further line," right, so if you don't have an Acting
24 Secretary, you don't have an Under Secretary of Management, the
25 Secretary can designate who else can act in that capacity, if I

1 credit all of that, doesn't that, once again, though -- if I am
2 to do as you agree I should, read the two statutes in harmony,
3 how do I not incorporate the time limit that is set in the FVRA
4 in this case?

5 Because the Vacancies Act, the purpose of that Act is to
6 make sure that when Congress gives to the President a little
7 bit of wiggle room in terms of nominating for an office for
8 Senate confirmation, that the wiggle room has some limits on
9 it. Because it is, at its core, a constitutional question.

10 If I have to read them together, 113 doesn't have any
11 timing provision on it, no guardrail whatsoever. FVRA does and
12 the whole purpose of the FVRA is to put some guardrails on
13 this.

14 What's my authority for not reading -- well, let me ask it
15 this way. If I credit your argument wholesale, the effect of
16 it is that I'm not reading the remaining provisions of the FVRA
17 as having any import here, right?

18 MS. ANDERSEN: I mean, with respect to this case, the
19 only thing that's relevant is the 210 days.

20 And to answer Your Honor's argument about, you know, why
21 it shouldn't be incorporated is just a matter of, you know, we
22 should assume that Congress meant that or that, you know, the
23 200 days -- the 210 days by itself, obviously, is not a magic
24 number. There's not some magic constitutional number.

25 The history of it, it had changed. It used to be shorter.

1 They've extended it.

2 THE COURT: Right.

3 MS. ANDERSEN: And there's certainly reasonable
4 reasons why Congress would, for different agencies, especially
5 like a very important agency like Homeland Security, might not
6 want a position to be vacant, you know, past the 210 days.

7 And just, again, just as a -- more just of a -- some
8 perspective is that even under the Federal Vacancies Rules Act,
9 you know, Congress did envision longer periods of time where it
10 would be vacant. Of course, those facts aren't present here
11 but just as conceptually that, again, 210 days is not a magic
12 number.

13 THE COURT: Except those other examples matter
14 because it's when there's a nomination on the floor, right?
15 And so Congress has some -- the Senate has some skin in the
16 game, if you will, as to how long that might take, right?
17 Where what we have here is -- what I'm struggling with is if I
18 credit your argument, what's the limiting principle? Like,
19 what, what allows the President to -- or what would prevent the
20 President from placing someone in office who must be nominated
21 and confirmed by the Senate to have the authority that he or
22 she has without going through that process? What in the HSA
23 limits the President's authority and doesn't allow ad infinitum
24 acting secretaries for the entire time of that person's tenure?

25 MS. ANDERSEN: Thank you, Your Honor.

1 You know, obviously, this has not been litigated. I can
2 point the Court to two different decisions that kind of shed a
3 little bit of light on this issue, but, again, just to go to
4 the general principle is it is permissible for Congress to
5 choose. You know, this is their responsibility to devise a
6 consent. So if they have chosen not to set a defined time
7 limit because they've decided, in their judgment, that they
8 want the executive branch, in particular the Homeland Security,
9 to have more flexibility and it becomes sort of more of a
10 political question, then binding an agency to a particular
11 timeline, that is within Congress' discretion. So that just
12 kind of answers kind of a more broader question.

13 And, again, the fact that the Homeland Security Act was
14 passed after the Vacancies Act, you know, not every agency is
15 given this authority. Not every agency head is able to pick
16 their order of succession. The Homeland Security is one of
17 them.

18 I think when we look at cabinet-level agencies, there are
19 certainly different concerns for why, you know, despite,
20 perhaps, some political issues for getting, you know, a
21 nomination confirmed or for whatever --

22 THE COURT: Right.

23 MS. ANDERSEN: -- any other reason that may be, there
24 could be good policy reasons that Congress decided not to
25 incorporate a defined number and leave it to within that realm

1 of, you know, it's a political question.

2 And, again, there's not a whole lot of litigation on this,
3 but just in case it is helpful for the Court.

4 THE COURT: But isn't it -- is it a political
5 question or a constitutional question? Because at this point,
6 again, even if I credit that the HSA is ambiguous in this
7 respect, and I still have to read it -- you know, again, moving
8 to another cannon of statutory construction, then I've got to
9 -- if I say, wow, it's ambiguous, I'm not really sure, the
10 government raises a good point here, I then have to read it in
11 a manner that gives the appointments clause -- that would
12 render this decision a constitutional one or render, I'm sorry,
13 the reading of the HSA to be constitutional. And the only way
14 I can do that is to say there's got to be some way that the
15 appointments clause has meaning here.

16 And that gets me back to, so where do I read in the HSA
17 any limiting principle, even crediting that Homeland Security
18 should have maybe more authority than some other agencies
19 because of the important function it serves?

20 MS. ANDERSEN: Yes, Your Honor.

21 And I give those examples as just why Congress, you know,
22 they didn't expressly incorporate it in there.

23 And to answer Your Honor's question, the one case that I
24 think --

25 THE COURT: They did not expressly? They didn't

1 expressly?

2 MS. ANDERSEN: They did not put a number in, correct.
3 Correct.

4 THE COURT: Okay.

5 MS. ANDERSEN: There's a case from 2018 from the
6 District of Minnesota. It's *Bhatti v. FHFA*. And that case
7 involved -- it's at 332 F.Supp 3d 1206, and that case involved
8 an acting director of the Federal Housing Finance Agency who
9 served under President Obama in an acting capacity for four
10 years.

11 THE COURT: Okay.

12 MS. ANDERSEN: And there were people that challenged
13 that and saying four years is much longer than the facts that
14 we have here before the Court today, and it was asserted that
15 four years in an acting capacity for a Senate-confirmed
16 position was constitutionally too long.

17 That court, they held that that was a political question,
18 that whether an officer has served for too long is something
19 that the court should not weigh into, and they cited some
20 Supreme Court cases about, you know, non-judicial discretion
21 and those sorts of things. That's just a premise.

22 I'd like to step back from that because that's, obviously,
23 a tough -- you know, once it gets to that point, that's a tough
24 -- you know, a tough issue to think through.

25 Here, I --

1 THE COURT: But you haven't argued political
2 question, have you? I mean, you didn't -- I don't recall you
3 raising that this is a question the Court shouldn't weigh in on
4 when there's a statute at issue.

5 MS. ANDERSEN: Yeah, I think the issue here is that
6 the -- Secretary Wolf who, you know, number one, was Senate
7 confirmed for a germane position -- so just going back through
8 a little history is when Senate McAleenan had announced he was
9 going to resign, he agreed to stay on, you know, to help
10 transition. It was at that time that now Acting Secretary
11 Wolf, his nomination for a different position was before the
12 Senate.

13 Senator -- I'm sorry. Acting Secretary McAleenan had
14 reissued the new order of succession. Everybody knew.
15 Congress knew. You know, there were press reports about that,
16 that, you know, it was envisioned that it was Secretary Wolf
17 once he was Senate confirmed. And I mention that because the
18 fact that he was Senate confirmed for a different position
19 within the agency, if you're thinking about it as a
20 constitutional issue, is important. So that's one factor.

21 So, again, I guess just the time limit alone is not the
22 only factor if the Court was to, you know, weigh into sort of
23 the constitutional issue.

24 So he was Senate confirmed. The Senate was aware that he
25 would be next in line as acting and that the other positions

1 were vacant.

2 And then, again, just going to the -- if you look at the
3 actual numbers, I understand there's differences within the
4 FVRA with the 210 days, that, you know, there's some back and
5 forth with Congress; but it does, again, envision -- if you're
6 worried about somebody in an acting position serving beyond the
7 210 days, it does envision a situation, for example, where
8 somebody is serving as an acting official for 210 days, the
9 President nominates somebody, the President then withdraws
10 somebody, you get a whole-nother 210 days. And that can happen
11 twice. So you're talking, you know, over 500 days.

12 We're not even at 500 days today.

13 THE COURT: But that's when the President and only
14 the President decides to nominate, right? I mean, we're not in
15 that category. And, again, Congress knew how to give wiggle
16 room when we're in that category but we're not there.

17 I mean, I understand. I think your argument is that we're
18 a little kind of the functional equivalent of it. So if,
19 Judge, if you're worried about the spirit of the statute and
20 reading it the way the government suggests, you're not going to
21 run into any constitutional infirmity because Acting Secretary
22 Wolf kind of fell in that category. Right?

23 MS. ANDERSEN: Yeah, yeah. I think -- I think courts
24 are advised not to sort of dive into these constitutional
25 issues unless they have to. There's a number of steps before

1 we get there and one of them being is that, you know, Secretary
2 Wolf, you know, if you compare it to some history and some
3 other acting positions in various roles, is less than 500 days.
4 From a historical perspective, that is not, I think, so
5 unreasonable that it would kind of fall into that category of
6 any kind of -- reaching a constitutional issue.

7 Now, whether or not -- you know, so I think it more goes
8 to the statutory, you know, argument.

9 And the other case -- just in -- again, it's an old case
10 and it's not from this district, but just because there's not a
11 whole lot on there, I was trying to find more cases -- from the
12 Eastern District of Michigan, *United States v. Lucido*, 373
13 F.Supp 1142, and that's a different statute but it was a DOJ
14 office-specific vacancy. And there just the court held that an
15 Acting Attorney General could serve beyond what the Vacancies
16 Act at that time, you know, had required.

17 THE COURT: But that was -- okay, so that was
18 pre-FVRA, right?

19 MS. ANDERSEN: It was a vacancy. It was an old one.
20 It was a 30-day time limit. So it was two different statutes.
21 So I don't know, you know, how great weight it is, but just
22 conceptually, we said there's -- again, there's not one magic
23 number.

24 THE COURT: And I think some would say, including the
25 amici, that the FVRA was designed to plug up some of those

1 loopholes that were at issue when the FVRA was passed; that
2 there had been -- you know, 20 percent of the relevant offices
3 were empty because the prior Vacancies Act allowed for sort of
4 ad infinitum, if you will -- that's my word -- appointments.

5 And so I'm not really sure. I mean, I'll take a look at
6 it to see if it, you know, has any relevance here, but would
7 you say -- is the same thing -- it sounds like *Bhatti*, though
8 -- I didn't get the whole cite -- 332 F.Supp 3d, that one is
9 post FVRA.

10 MS. ANDERSEN: Yes, although it did -- yes. That is
11 (2018) 332 F.Supp 3d 1206.

12 THE COURT: 1206. Okay. Thanks. All right, great.

13 MS. ANDERSEN: And, obviously, you know, I read
14 through, obviously, the amici briefs. You know, I think some
15 of those older cases were housekeeping statutes, which is
16 different than what we're dealing with here, too. So I just do
17 want to distinguish that. I think that's different in kind,
18 that this is intentionally Congress expressly saying the
19 Secretary can create an order of succession, which is different
20 than delegation of duties, for whatever that's worth.

21 THE COURT: Okay. All right.

22 MS. ANDERSEN: I would like to address the first
23 point, if Your Honor will allow me to --

24 THE COURT: Sure.

25 MS. ANDERSEN: -- Secretary Nielsen's memo, unless

1 you have any other questions about that provision.

2 THE COURT: No, I'm good. Thank you. I appreciate
3 your indulging me.

4 MS. ANDERSEN: Thank you for indulging me.

5 So, again, before we even get to Secretary Wolf's service
6 as Acting, we have to look necessarily at Acting Secretary
7 McAleenan who, according to the Department of Homeland
8 Security, was appointed through Section 113 and not the Federal
9 Vacancies Reform Act.

10 So if I can ask the Court to look at -- I don't know if
11 you have it in front of you or not -- Exhibit 1 to the
12 declaration of Neal Swartz, which is at ECF 41-2, beginning at
13 page five of that filing.

14 THE COURT: All right. So let me go to -- okay.
15 Give me the 24 --

16 MS. ANDERSEN: 41-2.

17 THE COURT: ECF 41-2. Okay. What am I looking for?
18 Because I may have it somewhere else.

19 MS. ANDERSEN: Sure. It's the memorandum that
20 Secretary Nielsen signed dated April 9, 2019. I think we did
21 include it in two different places.

22 THE COURT: Yeah, because I know I have your
23 exhibits. At least I want to say it is -- let me find it.
24 But, yeah, I have read it. I've read part -- in my head, A and
25 B, Section A and B. So if you want to, while I look for it,

1 I'll -- you can go ahead.

2 MS. ANDERSEN: Okay. So before I sort of get into
3 the memo, just two, again, concepts to keep in mind is that,
4 you know, once Congress passed the National Defense
5 Authorization Act for fiscal year 2017, it was at that time
6 that Congress added the Section 113, which gave the Secretary
7 her authority to designate an order of succession, and that was
8 not the case beforehand.

9 But even prior to that, under -- it's 6 U.S.C. Section
10 1-2, that goes to the Secretary of Homeland's ability to
11 delegate specific duties, and, again, that's just a general
12 concept that is applicable in a lot of agencies where you can
13 delegate specific duties for various reasons; and the order of
14 succession is, you know, a distinct concept even though they're
15 oftentimes the same list of people.

16 THE COURT: Right.

17 MS. ANDERSEN: And that's just to kind of keep that
18 -- I think it's important, at least it was for me, to kind of
19 keep those two principles in mind when looking at the
20 memorandum that Secretary Nielsen signed.

21 So, again, you know, the government's position is that the
22 Court has to just look at this April 9th memorandum, that this
23 is the operative document. And, you know, depending on what
24 the Court finds, if it's clear and unambiguous or not, this is
25 what the Court needs to look at.

1 THE COURT: Well, and so I think I have it up now.
2 It's 41-2, Exhibit 2, correct?

3 MS. ANDERSEN: Correct.

4 THE COURT: And the two provisions are under Title
5 II, Succession Order/Delegation. "A" says, In the event of
6 death, resignation, or inability to perform, I look to the
7 Executive Order 13753, and that was the one in place -- put in
8 place by President Obama.

9 Section B says, In the event of disaster or catastrophic
10 emergency, "I hereby delegate to the officials occupying the
11 identified positions in the order listed (Annex A), my
12 authority." Right? I'm looking at the right place?

13 MS. ANDERSEN: Yes.

14 THE COURT: Okay. So what is the argument that this
15 falls in anything other than A, which is resignation -- that's
16 what happened; she resigned -- the orderly succession of
17 officials is governed by the Executive Order.

18 MS. ANDERSEN: Yes, Your Honor. So what I actually
19 would like -- so Exhibit 2 is an internal administrative
20 document. This was actually updated on April 10th, the day
21 after Secretary Nielsen signed the memo, which is found at
22 Exhibit 1. So it should be a few pages before that.

23 THE COURT: Okay.

24 MS. ANDERSEN: And I think this is where the
25 confusion is. So, obviously, there was confusion and there was

1 an error made but my -- the error was made in amending this DHS
2 order, which was done -- you know, it's an administrative
3 function, but the legal authority for the Secretary was done
4 the day before when she signed the April 9th, 2019 memo.

5 THE COURT: This is the order of delegation, right?
6 I mean, this says order of -- what document am I supposed to
7 look at for the official order of delegation? The GAO looked
8 to this document, right?

9 MS. ANDERSEN: Well, the GAO also looked at
10 Exhibit 1.

11 THE COURT: Okay. So let's look at Exhibit 1.

12 MS. ANDERSEN: Yeah. As soon as the Secretary makes
13 a decision and decides, this is what the order of delegation
14 is.

15 THE COURT: Okay.

16 MS. ANDERSEN: That becomes legal and binding. So
17 the second she signed this memo, the April 9th, 2019 memo --

18 THE COURT: At Exhibit 1.

19 MS. ANDERSEN: -- if something happened a minute
20 later and that was never incorporated into what's Exhibit 2,
21 the DHS orders, I don't think anybody would argue which
22 document controlled and that's because the DHS orders is an
23 internal document, and the basis for that is also set forth in
24 the declaration.

25 But this is an administrative document. It, in and of

1 itself, does not have legal effect. It is the April 9th memo
2 that has the legal -- that is the legal effect. So, again, in
3 a hypothetical, if on April 9th, 2019, the Secretary signed
4 this and the minute she signed it, she resigned, it would be
5 this document that controlled.

6 The confusion, of course, becomes this memorandum refers
7 to the prior DHS orders. So that's why we're here today and
8 that's why there's a dispute. And what I would like to do is
9 explain sort of what this memo actually did, what should have
10 happened and then what actually happened.

11 THE COURT: All right.

12 MS. ANDERSEN: Because, you know, again, the
13 government concedes that it was not updated appropriately,
14 which was, you know, why there's confusion today. It was later
15 fixed but that's kind of moot for this case.

16 THE COURT: I mean, listen, let me stop here because
17 I have to read the black and white on the page, and if I look
18 at Exhibit A, it still refers to what? I mean, where in
19 Exhibit A or where in Exhibit 1 do I find the authority to say
20 that Secretary McAleenan was the next in line?

21 MS. ANDERSEN: So if you will bear with me, if you
22 would start from the top of that document of April 9th, so this
23 is a memorandum that is prepared by the general counsel of the
24 department, and, obviously, the subject, it refers to order of
25 succession for Secretary. It doesn't talk about delegation of

1 duties. It talks about the order of succession with no
2 limitations.

3 THE COURT: Okay.

4 MS. ANDERSEN: In the summary, it does two things.
5 It also, once again, talks about the order of succession.
6 There's no limitations in there. It also refers to Section 113
7 and, again, 113 talks about order of succession. It is Section
8 112 that refers to delegation of duties, which is, again, a
9 distinct principle.

10 And then, again, in the action, you know, it states, by
11 approving the attached document, you will designate, again,
12 your desired order of succession with, you know, no
13 qualifications in it.

14 THE COURT: Okay.

15 MS. ANDERSEN: So, so far I think it seems -- if you
16 just read this, you were, like, this is what the Secretary is
17 doing. She's changing the order of succession. There's no
18 limitations.

19 If you flip to the attachment, so there's the heading --

20 THE COURT: That's the next page.

21 MS. ANDERSEN: The next page was an attachment to the
22 memo that the Secretary signed. So the heading, again, is
23 amending the order of succession. Again, the first paragraph,
24 it references Section 113 and --

25 THE COURT: Yep.

1 MS. ANDERSEN: -- tells us that her intention is to
2 change the order of succession.

3 THE COURT: Okay.

4 MS. ANDERSEN: And then it refers to Annex A, which
5 then cross-references the prior DHS order, which is the
6 administrative document, and it says you should amend Annex A
7 and you should insert this new list. And this new list is
8 where --

9 THE COURT: Okay, for Annex A. Okay.

10 MS. ANDERSEN: So the problem is, is when the next
11 day -- so then this gets signed by the Secretary. She signs it
12 on the 9th. She resigns the next day. Senator McAleenan takes
13 over, assuming that this is -- you know, with the understanding
14 that this was done properly. Then it goes back to I think it's
15 the general counsel's office at Homeland Security. They
16 endeavor to update this internal document.

17 And, again, if you read what this document, what the memo
18 clearly did, which was the Secretary invoking her authority
19 pursuant to Section 113 to change the order of succession, what
20 should have happened was not only Exhibit A -- or Annex A
21 should have been included but the first page of the DHS orders,
22 paragraphs IIAB should have been merged together because,
23 again, clearly, number one had governed the order of succession
24 and that should have been updated to actively reflect what the
25 memo does.

1 THE COURT: But, I mean, it doesn't just -- it's not
2 just a scribner's error. It's not just a we didn't update the
3 right thing. I mean, A and B then break that out very
4 specifically. Which Annex A -- I mean, first, Exhibit 1 deals
5 with invoking 113, changing the order in Annex A. Right? I
6 mean, that's fair, clear. And then the order of Annex A on
7 page two of Exhibit 1 now puts in a new order.

8 Okay. Now I look to what was updated 4-10, DH Orders of
9 Succession. This is a legal document, right? I mean --

10 MS. ANDERSEN: No. No, Your Honor. It is an
11 administrative document. And, again, the example would be what
12 if the people in the office, you know, took the Secretary's
13 memo and changed it and altered it? I don't think -- you know,
14 a court would not say, well, that's binding because the
15 Secretary is the only person that has the authority to do it.

16 So if it was incorporated incorrectly by staff, the Court
17 cannot give that legal effect. The Court has to look only at
18 the April 9th memo, which is what Secretary Nielsen signed.

19 THE COURT: But I look at the April 9th memo and all
20 it does -- because I'm looking at the next section of it. It
21 says, I designate the order as follows: Annex A, Orders of
22 Succession, Delegations of Authorities for Named Positions,
23 Delegation 00106, is hereby amended by striking Annex A and
24 substituting what she substituted.

25 MS. ANDERSEN: Yes, Your Honor, but if you want to --

1 if you were to give effect to the preceding paragraph, which
2 is, By the authority vested in me, as Homeland Security,
3 pursuant to Section 113, I hereby designate the order of
4 succession, the only reasonable interpretation would be that
5 the folks the next day that were updating the DHS orders
6 necessarily had to merge Section IIA and B in order to give
7 effect to the memo.

8 THE COURT: But they didn't necessarily -- but they
9 didn't have to because A, A refers to an Executive Order 13753.
10 If her April 9th, what you call the official authority, if that
11 is telling staff what to do, it doesn't even reference, does
12 it, the Executive Order at issue. It just references Annex A.

13 MS. ANDERSEN: No, but it --

14 THE COURT: If she were changing the order of -- the
15 order of succession with respect to the Executive Order as it
16 was written in the original issue date to 12-15-2016 in
17 Exhibit 2, if she was going to change that, she would have
18 referenced it, right? I mean, how do I just read that she
19 really meant to change both?

20 MS. ANDERSEN: Your Honor, because of the -- not only
21 in the prior paragraph but in the entire, you know, memorandum
22 of the first page it says that she is designating the order of
23 succession. So she's not saying I want to change the
24 delegation of my duties in the event of disaster or
25 catastrophic emergency, which is a very, you know, limited kind

1 subset. Throughout the memo it is expressly clear that her
2 purpose of signing this memo is to change the order of
3 succession and not the delegation of the duties, and there is
4 no qualification anywhere in this memo.

5 So, again, this becomes a problem of --

6 THE COURT: Well, the qualification --

7 MS. ANDERSEN: -- execution --

8 THE COURT: The qualification is "I hereby designate
9 the order of succession for the Secretary of Homeland Security
10 as follows:" And then the reference is to Annex A. So the
11 qualification is what I'm changing is Annex A. I mean, she has
12 the authority and she's using it, no doubt.

13 MS. ANDERSEN: She has the authority. She has the
14 authority to issue her order of succession. Clearly this was
15 the day before she left. I don't think she was worrying about
16 what would happen in the case of a disaster or catastrophic
17 emergency.

18 So, again, I don't think you can read only what Annex A
19 used to refer to when the preceding paragraph and everything
20 else in the memo talks unambiguously, without any
21 qualification, about order of succession. And, again, if you
22 replace this with Annex A but then merge the first two
23 paragraphs, that would have accurately reflected what the
24 Secretary was doing on April 9th --

25 THE COURT: Here's my -- here's my problem with it.

1 I am not here to get in the head of Secretary Nielsen at the
2 time and neither are any of the lawyers. If I read this, and I
3 don't see a lot of room for an alternative explanation, the
4 first page of Exhibit 1 is, Pursuant to your authority under
5 6:113(g)(2), you're amending the order of succession.

6 And then the second page says, By the authority vested in
7 me, yes, I'm amending the order of succession as follows. And
8 then it only references Annex A.

9 She does this in light of the memo at Exhibit 2. That is
10 what was in place for her tenure.

11 MS. ANDERSEN: That was in place. And just, you
12 know, again, for some context, I agree with you, you know, the
13 Court needs to find that the April 9th memo, you know, directed
14 as we say it did; but just for context, again, you know, the --
15 for all the other positions -- so, again, when this initial
16 memo, the DHS orders, 106, was first done, this was before the
17 Secretary had the authority to delegate her order of
18 succession, which is why in paragraph A it refers to the
19 Executive Order, because the Secretary didn't have the
20 authority at the time. That's why that exists.

21 The other provision, Annexes B through AC, which are also
22 included in the exhibit, those are for lower level positions.

23 THE COURT: Right.

24 MS. ANDERSEN: All of those positions, you know, for
25 order of succession and delegation of duties is the same list.

1 So, again, the fact that it's referring to Annex A, you know,
2 for both purposes is not -- it's consistent with the rest of
3 the DHS orders.

4 And, again, what would trouble me is how -- if Annex A was
5 not intended to apply to both paragraphs IIA and B, how do you
6 read in, like, that first paragraph of -- you know, that says
7 by the authority vested in me pursuant to Section 113, I hereby
8 designate the order of succession? You know, if you read that
9 out, then is that appropriate --

10 THE COURT: No. No, you read it as the reason why
11 she can change Annex A. And, again, I mean, it's just -- it's
12 because she has the authority. She has the authority to change
13 both. She chooses Annex A, disaster or catastrophic emergency.
14 Again, I am not looking behind why the agency would do what
15 they did at any particular time. I'm just trying to read it
16 and give the plain language its meaning.

17 So I'm not reading it out. She has the authority to
18 designate a further order of succession. That's (g)(2). And
19 her further order of succession is with respect to those
20 positions in the event of disaster or catastrophic emergency
21 because she's only talking about Annex A.

22 I mean, I want to think -- I want to think more about your
23 argument that it has to mean both A and B because she didn't
24 have that authority back in 2016. It had to come from the
25 President. Now she does have that authority and so --

1 MS. ANDERSEN: Yeah, in Section 1-2, which has -- you
2 know, it just says previously -- does talk about delegation of
3 authorities generally, you know, of when the Secretary can
4 delegate authority. So, again, delegation -- because, again, I
5 think if you think about, you know, if I am unable to act
6 during disaster or catastrophic emergency, that implies there
7 is a limited period of time I can act. You know, somebody else
8 can act on my behalf but I'm still the Secretary and I'm going
9 to come back. That's different than my order of succession
10 meaning I'm going to resign and who is going to replace me.

11 THE COURT: I see what you're saying. So you're
12 saying that, basically, order of succession in the first
13 paragraph and second paragraph of Exhibit 1 on page 2 doesn't
14 make any sense if you're only looking at B?

15 MS. ANDERSEN: Correct. And I think the fact that
16 there are no --

17 THE COURT: Because it's not --

18 MS. ANDERSEN: Yeah.

19 THE COURT: Because B is not about an order of
20 succession; it's about who's going to step in, in a disaster or
21 catastrophic emergency. Okay. I think I get it. Okay.

22 MS. ANDERSEN: And that is all I have on that issue
23 unless I can answer anymore questions.

24 THE COURT: Thank you.

25 All right. Let's turn then to Mr. Manfredi. Am I saying

1 your name right?

2 MR. MANFREDI: (Man-Freddy), yes.

3 THE COURT: (Man-Freddy). Okay.

4 All right. If you would, can you pick up on
5 Ms. Andersen's last point first and then we'll get to the
6 timing provision. The last point seems to be urging me to read
7 the memorandum as not just referring to Annex A but to the
8 entire order of succession.

9 MR. MANFREDI: Yes, Your Honor.

10 I mean, we disagree. We think that the plain text of the
11 memorandum, especially in the portion you cited, is clear that
12 it says "as follows." That's the only amendment the plain text
13 supports concluding that the Former Secretary Nielsen intended
14 to make at all, and it's clear that in the "as follows," all
15 that is referenced is the order within Annex A.

16 And I would just refer Your Honor to the GAO's finding
17 specifically on this issue. They determined that these were --
18 they declined to sort of count any of these arguments as post
19 hoc justification, basically, suggesting that they did
20 contradict the plain text and would require basically an extra
21 textual reading about what was required. We think it's
22 perfectly consistent to read it as being limited to this
23 amendment.

24 And I would just add secondarily that we also would
25 maintain that it's implausible to suggest that the delegation

1 is merely an administrative document and that Secretary
2 Nielsen's directive could have had any independent authority
3 aside from amending the delegation, because by its own plain
4 text, that's all it purports to do is amend the delegation.

5 And, additionally, the delegation is not contrary to what
6 the Swartz declaration suggests; merely the administrative
7 document is signed by Secretary Jeh Johnson and does invoke his
8 statutory authority under both the HSA and FVRA for its
9 changes. So we think it's quite clear that that is an
10 authoritative legal document.

11 And if there were any doubt, Your Honor, as to the
12 intended effect of Secretary Nielsen's changes, we think
13 Mr. McAleenan's changes that he attempted to make on day 214
14 are quite clear. He, in fact, does amend the delegation to
15 remove Section A and make Annex A the appropriate document only
16 in the case -- in the case of resignation, excuse me, as well.

17 And it would seem quite clear -- this is what the *La*
18 *Clinica* court found, as well as the GAO report -- that those
19 amendments would have been superfluous if the government's
20 interpretation that this was a succession order that exceeded
21 delegation --

22 THE COURT: I see your point. Yep. Secretary
23 McAleenan wouldn't have had to do it.

24 MR. MANFREDI: Absolutely. Yes.

25 THE COURT: Got it. Okay.

1 And then with respect to the argument that under the FVRA,
2 under 3347, I can read the HSA as basically being the exclusive
3 statute, so, you know -- and read in some sort of -- I guess
4 the only way that I can think about this is, best argument for
5 the government is I can read into HSA some reasonableness in
6 terms of a timing provision, that it must have meant to give
7 Homeland Security its own timing -- "reasonableness" is the
8 only word I can think of. Like, we'll keep it open for a
9 reasonable period so it's not unconstitutional.

10 What's your response to that?

11 MR. MANFREDI: I have three responses, Your Honor.
12 The first is I would just like to note that what I believe
13 Ms. Andersen stated now is, in fact, different than what the
14 government officially stated in the Federal Register in their
15 response to this argument in the Final Rule. If you look at 85
16 Federal Register 38557, the government claims that because the
17 HSA supersedes the FVRA, that that authorizes acting
18 secretaries to serve, quote, without time limitation.

19 So the government's view in the APA context -- and we
20 would assume they would be, perhaps, obligated to maintain that
21 view, at least as to these rules -- is that the Secretary --
22 that the HSA, in fact, doesn't impose any time limit at all;
23 that it is, in fact, a statute which authorizes indefinite
24 service for an acting official absent Senate confirmation in
25 their role.

1 THE COURT: Even though -- and I'm sorry to interrupt
2 you but I just found it quite appropriate.

3 Even though the same agency saw fit to report the vacancy
4 under 3349?

5 MR. MANFREDI: We think that that supports our
6 position that it must be the case that the FVRA does, in fact,
7 cover the vacancy; and even if you look at the Exhibit 5
8 submitted in the Swartz declaration, that's a signed letter by
9 the general counsel reporting the vacancy, which, quote, says
10 the position is covered by the FVRA.

11 And so insofar as the government is now maintaining that
12 the FVRA is entirely superseded, we think that that's quite
13 odd. I mean, our foremost arguments are those about what is
14 the most sensible reading of the statute, which I'm happy to go
15 into additional detail, but it does seem clear that the
16 government both reported it, according to the FVRA's reporting
17 requirement --

18 THE COURT: Right.

19 MR. MANFREDI: -- and all those instances.

20 So it seems like at least those aspects of the FVRA the
21 government would, perhaps, concede aren't displaced, and that
22 would suggest to us as well that the time limits might also
23 should apply.

24 THE COURT: Okay. Right, because I'm not sure how I
25 say, well, 3349, that still applies.

1 MR. MANFREDI: Absolutely. Yes, absolutely.

2 THE COURT: 3345, you know, or the timing provision
3 doesn't but the reporting requirements do. I think I -- I
4 don't know how I do that.

5 Okay. Go ahead.

6 MR. MANFREDI: And I would just add, Your Honor, too,
7 that the government makes the point that Section 113(g)(2),
8 which they rely on here, was past -- which postdates the
9 Vacancies Act; but I want to note that in the same Defense
10 Appropriations Authorization that established 113(g), Congress
11 also added 113(a)(1)(F) to the statute which, again,
12 incorporates the FVRA, making the Under Secretary the first
13 assistant to the Deputy.

14 THE COURT: Right.

15 MR. MANFREDI: So it seems quite clear that Congress,
16 at least in that instance, intended to maintain FVRA
17 incorporation within the succession orders of DHS on the face
18 of the statute even at the time they gave the Secretary this
19 additional authority. Just to flag --

20 THE COURT: Because you're saying at the time (F)
21 was -- what we had read earlier together --

22 MR. MANFREDI: There are two other explicit
23 incorporations of the FVRA in Section 113.

24 THE COURT: Okay. Where is that?

25 MR. MANFREDI: The first is Section 113(a)(1)(A),

1 which makes the Deputy Secretary the first assistant to the
2 Secretary for purposes of the Vacancies Act, which we think,
3 again, makes it unequivocal that when the Deputy Secretary
4 becomes the first assistant, they serve pursuant to the time
5 limits of the Vacancies Act. That seems to be, to us, the
6 basis of the statute.

7 THE COURT: Right.

8 MR. MANFREDI: But additionally, section -- so that
9 was when the Homeland Security Act was first enacted. That was
10 in place at the time.

11 But then, again, Section 113(a)(1)(F), which makes the
12 Under Secretary the first assistant to the Deputy for purposes
13 of the FVRA, that was passed in the same appropriations bill
14 that established 113(g)(2). And so it --

15 THE COURT: I see your point. Got it.

16 MR. MANFREDI: The incorporation, yes, happened
17 simultaneously.

18 So we think it can't be the case that Congress intended to
19 supersede the Vacancies Act and its timelines entirely when
20 they precisely also mandated that it require -- apply to that
21 succession.

22 THE COURT: And when was that change to the HSA?
23 When did that happen?

24 MR. MANFREDI: So those changes were -- the exact
25 dates are a little -- I could check on them, but it's the

1 2016/2017 Defense Appropriations Authorization Act that added
2 those changes.

3 THE COURT: But you're saying they were part of the
4 same amendments?

5 MR. MANFREDI: They were part of the same amendments.
6 Exactly.

7 THE COURT: Okay. That's helpful. Okay.

8 MR. MANFREDI: And I just -- if I may, I know the
9 one -- I would add that of the one case the government cited,
10 the *Lucido* case, as Your Honor I think correctly noted, that
11 case was prior to the FVRA and, in fact, we think was one of
12 the reasons the Vacancies Act was passed was precisely to
13 prevent that from happening.

14 But the *Bhatti* case, which the government also mentioned,
15 I would just add we don't -- I think it's only dicta, the
16 political question doctrine in that case. The case was
17 otherwise decided on standing, we believe, and the court didn't
18 really reach any conclusion at all as to whether the time
19 limits would trigger an appointments clause problem.

20 And also that even insofar as that's the case here, we are
21 talking potentially, we believe, that this is the longest
22 running cabinet-level vacancy in modern history, and so for a
23 position at that level, it does seem that we're much -- insofar
24 as there is a constitutional concern, we're much closer; but
25 that, as a statutory question, interpreting the statute, what

1 you have to look at is not the precise appointments issue
2 arisen by Mr. Wolf's case but by what the government's
3 interpretation of 113(g)(2) would authorize, and here their
4 statement is that it authorizes unlimited service, so without
5 time limitation.

6 And so insofar as the Court is trying to avoid a serious
7 constitutional question in the reading of the statute, we think
8 that's what the Court needs to be apprised of.

9 THE COURT: Right, right. I mean, and I would take
10 it that the response to the, you know, executive knows how to
11 be reasonable and so we can import a reasonableness element to
12 113, the way that I -- when I think about that, I think about
13 it very practically, that that would mean that all challenges
14 end up before a court. Right? I mean, the whole reason why
15 Congress puts a time limit on it is so it's clear, upfront,
16 predictable, everybody can fall within it.

17 MR. MANFREDI: Absolutely.

18 THE COURT: And otherwise, the only guardrail on the
19 interpretation would be it has to be challenged before a judge
20 when whatever, you know, entity believes that the executive has
21 overstepped. And I'm not sure that's what Congress intended
22 when they said we'll give the President a bit of wiggle room on
23 appointments. So --

24 MR. MANFREDI: We agree, Your Honor.

25 And I think that the FVRA enforcement mechanism is also

1 quite clear in the sense of what Congress wanted the
2 consequences to be in instances where there was a violation
3 under Section 3348.

4 THE COURT: Okay.

5 And what else would you like me to know that we haven't
6 already talked about with respect to the interpretation of --
7 really anything that has to do with the FVRA and HSA?

8 MR. MANFREDI: Just that we think it's quite clear,
9 Your Honor, in this case that the FVRA's time limits do apply
10 to the position, that Your Honor can give effect to both
11 statutes, that that's the most natural reading, and that the
12 remedy in that case is clear and that even if Your Honor were
13 to find that the appointment -- if Your Honor, excuse me,
14 alternatively found that the appointment was invalid under the
15 HSA, that that itself could trigger an FVRA violation because
16 then they would not serve lawfully under the express statute,
17 which is an exception to the FVRA, which would get us back to
18 the FVRA as the only possible avenue.

19 THE COURT: Right.

20 MR. MANFREDI: And so then the FVRA's specific
21 remedial provisions would apply in that context as well.

22 THE COURT: So let me ask you both, and I'll actually
23 start with Ms. Andersen on this question, and this is the last
24 section in my mind on the FVRA. Any reason why I should not
25 convert this to a motion for summary judgment? Any additional

1 facts that are relevant to the (AUDIO GAP) -- way to avoid the
2 whole question of preliminary injunctive relief is not making
3 it preliminary. Like, if I'm going to decide it, I'll decide
4 it and then you all do what you're going to do based on my
5 decision.

6 So what's your view on that, Ms. Andersen? What would be
7 the reason to not convert this to summary judgment?

8 MS. ANDERSEN: Thank you, Your Honor.

9 I cannot conceive of any new facts that would have to be
10 before the Court to decide it. I guess the only sort of
11 hesitation I would have is to consult with my clients and the
12 Department of Justice to see if there was any additional, you
13 know, briefing or any sort of, you know, legal arguments just
14 to make sure that, you know, we've been heard on everything.
15 Because, obviously, especially with the GAO decision coming
16 down today, like, this has been moving. So that would be the
17 only thing I think I would ask.

18 But as far as a factual matter, you know, we do believe
19 that with respect to Secretary Nielsen's memo, that the Court
20 really needs -- can only look at that memo. And the other
21 issues are just pure legal arguments.

22 THE COURT: Okay.

23 All right. Would you agree with that, Mr. Manfredi, that
24 really -- I mean, absent maybe some additional time to make
25 sure you all have it, you covered the waterfront on the

1 arguments you want me to consider, this is -- I think you've
2 asked for it, that this is one of those areas where I can
3 convert it pretty quickly to a merits determination.

4 MR. MANFREDI: Yes, Your Honor. We do think that's
5 the case, especially as to the time limit provisions of the
6 FVRA. There's certainly no additional factual development that
7 would be required in that instance.

8 But we would just add that, you know, in our case, we are
9 seeking relief before the effective date of the rules on the
10 21st. So insofar as Your Honor will be able to move within
11 that time frame, that is the Plaintiffs' request.

12 THE COURT: And here's the rub. Right? It's exactly
13 what the Fourth Circuit opinion talks about. This is no fault
14 of the plaintiffs. I know that the notice of the Final Rule
15 just came out in June. You moved as quickly as you could. You
16 all have moved as quickly as I've made you to, and you've done,
17 both sides, an admirable job in briefing this.

18 But, you know, this may or may not be able to get decided
19 before they go into effect, although we're going to do it as
20 quickly as we possibly can and make it right, I guess is my
21 thought on that, which leads me to another -- again, before I
22 move on to the APA, because I am acutely aware that the APA --
23 I don't want to decide something that I don't necessarily have
24 to decide in the alternative, and we're going to talk about the
25 APA in a minute.

1 But I am concerned that there is a lingering -- (AUDIO
2 GAP) -- expedited consideration. I don't -- especially if
3 we're talking about moving one very important aspect of this
4 case to summary judgment.

5 So I am inclined to say in, again, a relatively truncated
6 time, because these are largely, if not exclusively, questions
7 of law, let's get two things briefed and that will be the
8 question of representational or associational standing, in
9 addition to organizational standing. I mean, you can tell me
10 why you think that the Fourth Circuit opinion doesn't really
11 knock you out of the box on organizational standing, because
12 there's five organizations. There are different
13 considerations, but there is also what wasn't really addressed
14 in the Fourth Circuit opinion. So standing, let's button it
15 up.

16 And then two, let's move to considering the question, the
17 FVRA/HSA question on a summary judgment posture, because I'm
18 hearing that there's no additional facts that the Court needs
19 to consider.

20 So we can do this one of two ways. We can talk a little
21 bit more now about the APA and then brief those other two
22 issues, but you can educate me on some of my outstanding
23 concerns with the APA questions and then we can set a briefing
24 schedule for this; or we can set a briefing schedule for these
25 other two things and then just reconvene a week or so from now

1 and deal with the APA at the same time, because I don't see the
2 APA as one that can be resolved on the record.

3 I think that if I find for injunctive relief, that there's
4 likelihood of success on the merits, I still, looking at this,
5 would see how the government would want your opportunity to
6 develop the factual record if for nothing else so I can look at
7 the underlying comments, the administrative record. So I just
8 don't see this one getting converted, converted on the merits.

9 And so from a procedural perspective, I'm not -- I almost
10 wonder whether we should take up the question of the HSA and
11 the FVRA first, because I can move to merits a lot more easily
12 than I can on the APA.

13 Government, what's your thought on that? And then I'll
14 turn to the plaintiffs.

15 MS. ANDERSEN: That sounds reasonable to do it that
16 way.

17 THE COURT: Plaintiffs, for -- I can't remember. Was
18 it Ms. Austin who will be handling the APA question?

19 You know, what's your thought on this wonky idea that I'm
20 having, which is that we move to a merits determination on the
21 FVRA? We can do it relatively quickly, and we still can reach
22 the APA but it may be on an injunction, as opposed to merits.
23 Or do you think we should just move right to merits on that as
24 well? Give me the administrative record and -- other than the
25 administrative record, I'm not sure what other facts there

1 would be of relevance.

2 MS. AUSTIN: If Your Honor doesn't mind, I might put
3 that to my colleague Mariko Hirose.

4 THE COURT: Okay.

5 MS. HIROSE: Thank you.

6 So if it's possible, Your Honor, our preference is to
7 begin to address the APA issues today. To the extent it's
8 possible, we would love for Your Honor to address all of the
9 issues that are ready for decision, just because the stakes are
10 so high for our clients; and should this case go up on appeal,
11 we think it might be more beneficial for the Court of Appeals
12 to have more of your analysis on the various issues rather than
13 less. But, of course, I understand that we are talking about a
14 short time period and that may not be feasible.

15 In terms of what we're requesting, what's really important
16 to us is trying to get some relief for our clients before
17 August 21st; and with respect to that, I would also like to
18 talk about other potential alternatives, including, of course,
19 a TR0 or postponement of the effective dates of the rules under
20 5 U.S.C. 705, which is a specific remedy that's available in
21 this context under the APA and is different from a preliminary
22 injunction.

23 So a lot of the concerns that the government has raised
24 and that were discussed in the Fourth Circuit decision last
25 week really don't apply to that relief.

1 THE COURT: Can you speak to that? How is it -- how
2 is it different if I'm -- if I'm getting your argument right,
3 it's that under 705, I'm staying the enforcement of these
4 rules.

5 MS. HIROSE: You're staying the effective dates which
6 is -- it seems like a minor difference, but I think the Supreme
7 Court has actually said that there is a difference between
8 stays on proceedings in a judiciary context versus an
9 injunction on a person that could lead to contempt.

10 And the other difference is that Congress specifically
11 contemplated this remedy in the case of an APA. So some of the
12 concerns that have been raised against preliminary injunction,
13 and the Court has brought up exercise of equitable authority,
14 doesn't apply here. And it would make sense that in the
15 context of an APA, Congress thought that this would be an
16 appropriate remedy because it's -- in most circumstances, as is
17 the case here, it just wouldn't make any sense to postpone
18 effective dates just in some limited manner that would just
19 result in a regulatory scheme that the agencies didn't intend
20 and that would be a burden to the agencies.

21 So it is consistent also with the vacatur remedy at
22 summary judgment that the APA provides for and that, of course,
23 the Supreme Court said in the DACA decision is entirely
24 appropriate at summary judgment.

25 THE COURT: But, I mean, it may be of a different

1 name but doesn't it have the same effect as a nationwide
2 injunction, which is -- again, if I look at the Fourth
3 Circuit's, at least in this case, clear pronouncement that I've
4 got to be very weary about only using such remedy in
5 extraordinary circumstances, one reading of that opinion is
6 that there's -- (AUDIO GAP) -- extraordinary circumstance.

7 But putting that to the side, you know, how do I reconcile
8 the clear -- you know, that whether I do it under 706 or 705
9 and whether I stay deadlines or I enjoin, what I'm -- the
10 effect of it is that I'm telling DHS to not enforce these
11 regulations when it intended to enforce them. And isn't that
12 the functional equivalent of a nationwide injunction?

13 MS. HIROSE: It may be practically similar, but
14 courts have recognized the distinction between saying that the
15 rules do not have effect and that defendants, including
16 individuals, are enjoined from enforcing the rules.

17 So I think that there's similarly some difference between
18 declaratory judgment and preliminary injunction where courts
19 have recognized that there's a difference, although, in effect,
20 they may look very similar.

21 And the same in the case *Nken*, which is about a stay of
22 judicial proceedings, stay in the context of appeal. The
23 Supreme Court has recognized that there is a difference and
24 that a stay is a lesser exercise of judicial authority than an
25 injunction.

1 So the Fourth Circuit decision didn't address these
2 differences, and it also didn't address the fact that 5 U.S.C.
3 705 explicitly provides for this remedy.

4 In addition, we've cited several cases in which
5 postponement of the effective dates, date of the rules, have
6 been affirmed by courts, including the Supreme Court and in the
7 Fifth Circuit; and like in those cases, defendants haven't
8 articulated a way in which it would be feasible to have more of
9 a narrower remedy given what Plaintiffs have put forward. It's
10 just a narrower remedy wouldn't face irreparable injury that
11 we've put forward, which is a burden on the organization. It
12 would just increase the burden, and it would be also, of
13 course, incredibly unfair and, just, I would imagine, a huge
14 burden on the agency as well because this is clearly not how
15 they wanted the regulatory scheme to move forward.

16 So in the context of an APA in particular, postponement of
17 the effective dates of the rules is the most appropriate remedy
18 at this stage.

19 THE COURT: Remind me, Government, did you address
20 705 in your responsive pleading?

21 MS. ANDERSEN: Yes, Your Honor. The courts have used
22 the same balancing test on the same factors under either prong,
23 and I am trying to pull it up now and I have it, but I'm like
24 99 percent sure that in the recent Fourth Circuit decision, in
25 a footnote, it did address this argument and rejected it, that

1 705 gives the court broader authority than an injunction would,
2 that it really goes to the ultimate, like on the merits, you
3 know, if you can vacate an order or not but doesn't talk about
4 preliminary relief.

5 If I can pull it up, I will. In my memory, it's in a
6 footnote.

7 THE COURT: Well, they asked for it; you're right. I
8 mean, the plaintiffs in that case moved for an order pursuant
9 to 705 postponing the effective date. So I wouldn't be -- I
10 mean, the problem that I'm having, again, is trying to move as
11 quickly as the parties are requesting, and seeing no practical
12 difference, I'd be hesitant to say, you know, that one remedy
13 is foreclosed pursuant to the Fourth Circuit opinion but the
14 other, which is the functional equivalent, isn't without a lot
15 more consideration and thought.

16 So I'm going to put that on the short list of, perhaps,
17 additional things you want to tell me about in another round of
18 truncated pleadings, because I'm not necessarily seeing 705
19 working differently.

20 So with regard to the APA, though, I'll tell you, I have a
21 hard stop of about 1:15, so I'm going to go right to where I
22 see the weaknesses of the likelihood of success on the merits.

23 I am more persuaded by the argument that the 30-day
24 Timeline Rule is arbitrary and capricious if for nothing else
25 than I find it implausible to say that the rule needs to be

1 amended to address the *Rosario* problem of 78 percent of the
2 applications can be processed within 60 days and the lion's
3 share within 90 days. It seems irrational and implausible to
4 say that the fix for that is to take away the timeline
5 completely.

6 And when you think about the whole purpose of *Rosario* was
7 about accountability and that's the only reason it was before
8 the court the way it was, and when I look at the administrative
9 record that there isn't a whole lot of support for this notion
10 that at once the government can say we can't predict the
11 future, that's why we can't have a Timeline Rule, but we can
12 predict, don't worry, asylees, because most of them we will get
13 to in 60 days, that just seems to be illogical. So that's
14 where I am on the 30-day Timeline Rule.

15 On the question of the interaction of the two rules, on
16 this record, I have to say I'm not yet persuaded that enacting
17 the Broader EAD Rules is arbitrary and capricious based on the
18 rationale that the plaintiffs -- the rationales that the
19 plaintiffs have given me. And where I am on that -- and I'm
20 going to turn to you first, Ms. Austin -- is that I'm not
21 terribly persuaded that this really falls into, first, you
22 know, content restriction like what they were talking about in
23 *United Farm Workers* and that, more specifically, some of the
24 characterizations of the comment and responses that the
25 plaintiffs give me don't really line up with the record.

1 So there were some -- the arguments about the agency
2 failing to consider the harmful effect on bona fide asylum
3 seekers point me to a back and forth about the intent of the
4 rule but not really the effect, and that the effect, while the
5 agency's, you know, response wasn't -- it left me wanting more,
6 it's not irrational or so implausible that I can find, given
7 the deference that I have to accord this matter on this record
8 with, you know, time ticking, can find it arbitrary and
9 capricious.

10 However, I am looking at the fact that there have been
11 some larger rationales for why do we need these rules at all,
12 and those rationales, I'm wrestling with them because they
13 still don't seem to hold water; like, these rules need to be
14 put in place to reduce fraudulent application. Based on the
15 historical data, I'm not quite seeing the statistics the way
16 that the government is.

17 So that's a lot. I know I threw a lot at you but that's
18 what I'm wrestling with right now. What would you like me to
19 know about your argument that I haven't understood?

20 MS. AUSTIN: Just to begin, to harms, the government
21 in some ways makes it easy for you by saying affirmatively and
22 absolutely that the Broader EAD Rule will not harm bona fide
23 asylum seekers, and it says that in many ways throughout the
24 preamble and that's the explanation that their policy making
25 has to be judged by. You know, that was the DACA case, but

1 this recent explanation requirement is not a mere formality;
2 it's what enables judicial review. It's what enables the
3 public to understand why an agency makes the decisions it
4 makes.

5 And so on the face of the government's explanation, it
6 says no bona fide asylum seekers will be harmed -- will be
7 deterred -- I'm sorry. I think I may have misspoken. They
8 said that no bona fide asylum seekers will be deterred from
9 pursuing their asylum claims. And that was a conclusory
10 assertion. There is no support for that and, in fact, there
11 were commenters that pointed them to evidence that that wasn't
12 actually true.

13 Commenters pointed out that absent work authorization, an
14 asylum seeker might not be able to pay for transportation to
15 get to their hearing. Commenters pointed out that they might
16 not be able to afford counsel. And the agency itself even
17 acknowledged that absent work authorization, asylum seekers
18 might be homeless, but that's tough luck. If that's a concern,
19 they should look up the homelessness resources of their state.

20 So I think, based on the information that the agency had
21 before it, you know, *State Farm* tells us that in order to
22 be reasoned, agency -- in order -- excuse me. In order for
23 their decisions to be reasoned, agencies have to connect the
24 facts found with the choice that they made. And here, the
25 decision that the agency made was contradicted by the

1 information before it.

2 It might have been a more difficult case if the agency
3 hadn't said so absolutely bona fide asylum seekers will not be
4 deterred from pursuing their claims, but it said that. And so
5 we have to --

6 THE COURT: But it doesn't say that, does it? I
7 mean, I'm looking at least at one part of the record where it
8 says DHS acknowledged that these reforms will also apply to
9 aliens with meritorious asylum claims and that these applicants
10 may experience some degree of economic hardship as a result of
11 heightened requirements; however, the ultimate goal is to
12 maintain integrity of the asylum process, and DHS has
13 determined that sustaining an underregulated administrative
14 regime is no longer feasible.

15 So the way that I read it in a number of places in this
16 record is they are making a judgment that based on the
17 evidence, they need to make these changes to deter frivolous
18 and fraudulent claims and that they acknowledge that it may
19 burden -- in my view, regrettably burden -- bona fide asylum
20 seekers; but they have made -- that it's an opportunity cost
21 that the agency has to acknowledge but that they believe the
22 deterrence factor in the fraudulent applications is paramount
23 right now given the strains on the agency.

24 MS. AUSTIN: Your Honor, and I think I may have
25 misspoken when I first got up to the podium, so to speak. The

1 harm that we are pointing to that the agency does not
2 acknowledge is that bona fide asylum seekers will be deterred
3 or prevented from pursuing their asylum claims. And we don't
4 have to go through it now, but I will just give you a few cites
5 where I think the evasiveness of the government is quite
6 glaring where they just say the opposite or respond by saying
7 this doesn't change the asylum standard, therefore, this could
8 not, you know, deter or prevent someone from pursuing their
9 claims.

10 So I think pages 38555 of Exhibit 3, and that's page 25 of
11 the exhibit if it's easier for you to go by that.

12 THE COURT: Okay.

13 MS. AUSTIN: And then another place -- I do find that
14 it's very instructive to follow, to trace their response to the
15 comments that are put forward.

16 And then the other one is 3858 -- excuse me, 38590 to
17 38592. In 38590, for example, somebody raised the problem that
18 the rule will force many bona fide asylum seekers, who do not
19 have the means to go without employment, to abandon their
20 meritorious claims.

21 And then, you know, tracing the government's response --
22 and, you know, I welcome Ms. Andersen's input because I don't
23 want to, you know, misrepresent; but as I read it, their only
24 response is asylum applicants will not be impacted in their
25 pursuit of their asylum claims because this rule does not

1 change any eligibility criteria for asylum.

2 And there's a similar exchange in 38591 to 38592.

3 THE COURT: And so run by me again what the argument
4 is.

5 MS. AUSTIN: That given that the purpose of the
6 asylum system is to respond to the needs of asylum seekers --

7 THE COURT: Right.

8 MS. AUSTIN: -- given that asylum seekers have the
9 right to apply for asylum, any change to the work authorization
10 rules that would impinge on this right to apply for asylum and
11 make it more -- and deter people from seeking protection from
12 persecution or force them to abandon their claims would be a
13 significant issue for the agency; and that, at the very least,
14 the agency should have grappled with that problem before making
15 policy.

16 But what the agency did was ignore the problem by either
17 asserting, in a conclusory fashion, that it did not exist,
18 which I will also say is irrational on the basis of the rule
19 because the agency said that it would be deterring people, just
20 somehow it would prune away all -- you know, that somehow the
21 effectiveness would be to prune away all non-meritorious claims
22 but somehow the meritorious claims would survive this blunt
23 instrument. You know, it's irrational on its face.

24 But the agency, you know, didn't grapple with the issue,
25 notwithstanding the fact that commenters brought the issue to

1 their attention again and again.

2 THE COURT: But let me ask you this, the part that I
3 just read to you, I mean, did it not say, listen, we know this.
4 We know it's going to have an affect not only on work
5 applications -- it said bona fide asylum seekers -- but we're
6 making the choice that we have to change the rules to deal with
7 what they call the underregulated administrative regime that's
8 no longer feasible.

9 So it's, in sum and substance, saying we know this is
10 going to adversely affect aliens with meritorious asylum
11 claims. They may experience some degree of economic hardship;
12 however, the ultimate goal, which is to reduce false and
13 fraudulent applications and lessen the burden on the agency is
14 what we have to consider.

15 And so to me that's the -- that's like the flash point is
16 does that make any sense? And the statistics that I'm seeing
17 don't necessarily bear that out.

18 MS. AUSTIN: I agree with you, Your Honor, on that
19 point, but -- and to your question about whether their
20 acknowledgment of monetary impacts -- because they very -- you
21 know, if you look at -- if you trace their responses, they are
22 very careful. They say that we acknowledge there could be some
23 monetary impacts, some qualitative impacts; but what they
24 refuse to acknowledge is that this will actually impinge on a
25 person's right to apply for asylum, and we think that that's

1 irrational.

2 And to the extent that the agency based its decision on an
3 assumption that no asylum seekers would be prevented from
4 actually pursuing protection, that explanation can't support
5 this policy that we would --

6 THE COURT: Okay. Okay.

7 Let me then turn, since our time is short. Ms. Andersen,
8 Ms. Austin invited you to comment. I'm inviting you to
9 comment. Tell me why this -- the agency did consider the
10 adverse impact on bona fide asylum seekers if they did; and if
11 not, do they have to.

12 MS. ANDERSEN: Thank you, Your Honor.

13 And I want to address this and if I can also address the
14 Timeframe Rule, because it seems like that's Your Honor's most
15 concern and I want to make sure --

16 THE COURT: Sure.

17 MS. ANDERSEN: But just very quickly, I think there's
18 a few sort of assumptions in Plaintiffs' argument that I just
19 want to address. So I think the most important being that it
20 was Congress that has authorized -- that has expressly stated
21 that there is no entitlement to work authorization while an
22 asylum application is pending, and that's extremely important
23 because Congress can do that. So if we're talking about harm
24 such as, well, I need to hire a lawyer, I need housing, I need
25 food, these are all things Congress could provide and maybe

1 they should but they don't, and, you know, those are harms that
2 currently exist.

3 So I think, you know, when we're looking at the rules, the
4 question is did this particular rule -- what are the harms that
5 this rule does for the change. So in the current system,
6 people already cannot obtain work authorization by mandate, by
7 statutory mandate for 180 days. So what this is doing is, you
8 know, it's extending it. And I think that's just important
9 when you're trying to look at what harms did the agency
10 consider, what harms are they required to consider.

11 So, yes, they absolutely acknowledge, and I cite through
12 the brief all the areas where they acknowledge that, you know,
13 this may delay some people from getting work authorization for
14 a longer period of time; but when you go down the rabbit hole
15 into, well, then they can't get counsel and, therefore, they're
16 not going to actually get their asylum application approved
17 when they really do deserve it, I think you've gone too far as
18 to sort of the, you know, the harm.

19 I think what the rule is trying to say is that these rules
20 don't govern asylum eligibility. They govern work
21 authorization while your asylum application is pending. Those
22 are two distinct things and those are two concepts that
23 Congress intentionally delineated, and they did this in 1996,
24 and they did this expressly because they wanted to separate
25 work authorization as a separate process from the asylum

1 application process because there was evidence at that time
2 that there were people that were using the system fraudulently
3 to be able to work. Because there was backlog, they knew that
4 if you submitted an application, you could delay the process
5 long enough and you could maintain, you know, your work
6 authorization.

7 So when this started back in I think the '80s, anyone who
8 filed an asylum application, they were authorized to work
9 within 60 days if their application had not been acted upon;
10 and that is when it proved unworkable first by regulation in
11 1994 but then by congressional mandate in 1996 where Congress
12 determined that the work authorization should be separated.

13 So, again, I think when there's -- when the plaintiffs
14 point to certain comments about this is not going to affect an
15 asylum, a person's eligibility, it's because it's not affecting
16 their eligibility under the law. What hurdles there might be
17 as far as, you know, financial burdens, those have always
18 existed.

19 You know, it's similar to our civil litigation system.
20 There is no right to counsel, you know, but, you know, those
21 analogies --

22 THE COURT: But you will agree -- I mean, I hear you
23 that, you know, this is against the statutory backdrop that
24 Congress said you have no right to work, but there has been a
25 20-year history of certain regulations that now the rationale

1 -- because this is the rationale that the agency is using --
2 saying, well, we have to deter fraudulent and frivolous
3 applications, they're not talking about work applications,
4 right? They're talking about asylum applications, right?

5 MS. ANDERSEN: There are people using the asylum
6 process to obtain --

7 THE COURT: Right.

8 MS. ANDERSEN: -- the work authorization, yep. So
9 that was one of the roles was to reduce incentives, to remove
10 incentives.

11 So currently, under this system, somebody can submit an
12 application, you know, obtain the work authorization in
13 180 days and then can delay the process through appeals even if
14 they don't have a meritorious claim, but they can remain to
15 work. So it's sort of two-prong; one, trying to deter that,
16 because you're going to have to wait a little bit longer; and
17 number two, trying to streamline the entire process so
18 everybody gets through the system faster. So it's a dual
19 purpose.

20 THE COURT: And I guess the point, the larger point
21 is that, you know, you say, on the one hand, they're really
22 separate but, on the other hand, they are the very reason --
23 it's the very -- the interconnectedness of the two is the very
24 reason why the agency is saying these changes must be put in
25 place.

1 And that's the plaintiffs' point, right, is, well, then,
2 if you're going to say that, agency, you've got to address the
3 harms it will cost to the bona fide applications because you're
4 saying that the work -- changing the work authorization is
5 going to reduce fraudulent ones. Well, what are they going to
6 do to the folks who are legitimately seeking asylum?

7 So what's -- what in the record says you've considered
8 that; not just saying, well, they're two separate things?

9 MS. ANDERSEN: And I should be clear. They
10 absolutely did address that and they acknowledge the harms. I
11 just want to make sure we're separating what harms, you know,
12 we're talking about.

13 And, you know, number one, it established the problem that
14 it addressed, but I'll go to the -- so, for example, on 38584,
15 it talked about -- well, this is addressing a problem about the
16 longstanding critical and growing crisis. Let me get to harm.

17 Okay. On page 38598, I think it's in 38598 where it talks
18 about -- it explains why the 365-day was picked, based upon the
19 average adjudication time, and it was not feasible to determine
20 a more precise time. And then it goes on to addressing some of
21 the harms, and the agency, you know, noted that if people are
22 fleeing from prosecution [sic], they would be willing to wait a
23 longer period of time, if necessary, or that same motivation
24 would not be present for people that, you know, were not bona
25 fide asylum seekers.

1 THE COURT: Okay, 38598 for me has -- I see it.
2 Okay, got it.

3 MS. ANDERSEN: I think in our brief we cited some
4 more examples but --

5 THE COURT: Okay, but 38598 is a -- it just is a
6 table, right? I mean, 38598 -- I'm looking at 85 FR 38598 and
7 mine is a table. It doesn't -- it's not a response to any
8 particular comment.

9 MS. ANDERSEN: Sure. Okay, so let me go back. I
10 think I was in the wrong section. So initially on page --
11 let's see -- you know, the primary purpose generally is to
12 mitigate the ongoing harms, and that's sort of the -- if you
13 look at the broader picture, because if we can deter, you know,
14 more people and we have more meritorious applications, it will
15 be able to be processed faster. So that's just one way it
16 addresses that. It will balance sort of any harms that are
17 associated with any delay in employment and that's because the
18 ultimate goal of all of this is let's actually decide the
19 underlying employment applications faster than we currently
20 are. The agency wants to do that better and that will help
21 everyone, including bona fide asylum seekers.

22 You know, currently, it can take up to two years. Some
23 people can get it much faster. So, again, if you look at broad
24 strokes, if that number can get down, as soon as you are
25 granted asylum, you can work right away. So, again, that's the

1 ultimate goal, right, is let's get everyone's asylum
2 adjudication fast. That was always the goal. Once somebody is
3 granted asylum, they can work, and we're not even worrying
4 about the, you know, 365 days or anything. So that's just
5 broad strokes of what the overall goal or one of the overall
6 goals is to do.

7 And starting at 38565, DHS expressly noted and considered
8 the impact on asylum applicants, and they provided the detailed
9 reason in that section. So it begins, DHS recognizes that this
10 rule may have a substantial impact on asylum applicants but
11 does not agree that the 365-day waiting period for employment
12 authorization is overly burdensome, cruel, or precludes aliens
13 from being self-sufficient. And it continues.

14 But I think I just want to address that because I do think
15 that's important, and part of it is just understanding what the
16 change actually does. So if you indulge me a little bit, and
17 I'll go quickly, the current rule is what's known as the
18 180-day Clock, but that day includes delays, applicant-based
19 delays. The 365-day Rule is currently a calendar day clock.

20 So it's not appropriate in all cases, at least, to just
21 say it's going to delay by six months for every individual. So
22 I think it's actually made clear in the plaintiffs' own
23 declaration. It is not uncommon for asylum applicants to
24 submit an asylum application and then request a postponement of
25 their hearing because they want to either get an attorney, they

1 want additional time. That happens routinely and I think
2 plaintiffs will agree on that, and that's their right to do to
3 get more time.

4 When they do that, when an asylum applicant asks for
5 postponement of a hearing, the clock, that 180-day clock stops
6 under the current rule and then it doesn't begin again until
7 you actually appear for that hearing that you postponed. So,
8 for example, if a hearing is scheduled on day 45, you ask for
9 postponement, you know, it's rescheduled and --

10 THE COURT: Right. No, I get it, but aren't there --
11 but aren't there other changes? I mean, this is such a broad
12 -- you know, there's many different changes in that many of the
13 other changes have to do with when and how an application is
14 actually complete. Right? So when the clock, the 365-day
15 clock would even start ticking. Am I right? So isn't it just
16 sort of a shift of these administrative -- or am I getting that
17 wrong?

18 MS. ANDERSEN: Yeah, actually, the rule -- you know,
19 the other thing that kind of goes broadly to show that the
20 agency acted appropriately within APA is that in the Broader
21 Rule, they made a lot of significant modifications based on the
22 comments, and that's shown throughout, and one of it was for
23 the 365-day waiting period. Initially it was based upon if
24 there were delays at the adjudication, but now, as long as at
25 the end of the year there are no applicant-caused delays, the

1 application can go forward; and that was like a modification
2 that they made, you know, to the comments.

3 So again --

4 THE COURT: And what's considered an applicant-caused
5 delay has changed, right? I mean, let me say this, for the
6 interest of time, I'm not sure that at this stage, for
7 preliminary relief, unless I find on its face, given the
8 Federal Register, that it's arbitrary and capricious, which is
9 a high standard -- you know, I can't second guess this stuff at
10 this stage, which is why, I'll tell you, I'm not wholly yet
11 knowing which way I'm going on the APA Rules.

12 But maybe in the minutes that we have left, Ms. Andersen,
13 can you address for me how it's at all rational to say -- to
14 address the problem of a too-tight timeline on the Timeline
15 Repeal Rule, which is going to take it away completely, how is
16 that rational?

17 MS. ANDERSEN: Your Honor, thank you.

18 Well, number one, I want to address Your Honor's concern
19 about the *Rosario* court. Keep in mind that that was only a
20 decision that told the agency it had to abide by its own
21 self-imposed regulation. So the only reason why it was, you
22 know, held to that standard was because in 1994, the agency
23 itself imposed that deadline. So that deadline is not by
24 statute; it's not a mandate by Congress. There is no mandate
25 and that's important because the agency has every right to

1 change its own regulations, and the standard is no different,
2 you know, than if it never had one in the first instance.

3 THE COURT: I don't know if I agree with that, number
4 one; and number two, it still doesn't make the decision
5 rational. You know, what's clearly rational is the agency
6 doesn't like *Rosario*. Okay. And they don't like *Rosario*
7 because they can't get it done and that they actually have
8 statistics that show what a push it was to get it done within
9 30 days.

10 But those same statistics show they can get the lion's
11 share done within 60 and, even better, 90 but reject any
12 timeline, and the reason is because they can't predict. They
13 can't predict what the ebbs and flows would be but they've
14 already predicted it. So I'm just -- that's where I'm kind of
15 chasing my tail on how is this rational.

16 MS. ANDERSEN: Again, it goes to that there are other
17 provisions within immigration law where there are no similar
18 deadlines, just as, you know, the courts don't have deadlines
19 on when they have to issue decisions by, you know, by mandate.
20 So just conceptually, there's nothing problematic. There's no
21 requirement to have a deadline of when any adjudicator
22 adjudicates things.

23 The 30-day time limit was set 20 years ago. Things were
24 extremely different, and that's set out in the rules. There
25 were adjudicating local INS officers. There were not the same

1 sort of national security and background checks that are
2 required today, which necessarily takes longer. I think
3 there's data in there, at least from 2013, about just the
4 influx of applications, a whole host of that which I think Your
5 Honor is aware of.

6 So the question was -- and they did expressly address
7 whether a 45-day or a 90-day deadline would be a reasonable
8 alternative, and, again, I think it's just a very, you know,
9 rational sort of result of saying, listen, 20 years ago, the
10 agency thought 30 days was totally sufficient, and it was for
11 some period of time, and that changed and it was changes we
12 couldn't foresee.

13 So if we're going to go through the notice and rule
14 comment period, issue a new rule that may also be on the books
15 for another 20 years, and we have no idea what 10 years from
16 now is going to look like, what challenges this country may be
17 facing or not or what's happening around the world, you know,
18 why box us in when there's zero, you know, mandate by Congress?

19 And there are other things in place to hold -- you know,
20 USCIS is very transparent with all of their deadlines. You can
21 go on their website, put in any application, and you can see
22 what the average waiting time is. So they do try to hold
23 themselves to an accountability, things they're trying to get
24 better at --

25 THE COURT: Which is different than saying -- which

1 are different than what they say in the Federal Register, by
2 the way. I mean, it's kind of a -- it's a moving target
3 because USCIS says, well, this can take anywhere from a month
4 to a year. That's not really helpful to an applicant, and it's
5 certainly not helpful to the court to figure out what -- how
6 this is a rational fix to this problem, especially in light of
7 -- and, again, you all have much bigger brains than I do so --
8 and you've been doing this for a lot -- you know, this is your
9 thing, and you're helping me bring me along.

10 Tell me why it's rational in light of the 365-day change.
11 Right? So before it was only six months you had to wait, and
12 there was a 30-day adjudication process. Now it's a year you
13 have to wait and there is no timeline for the agency, and the
14 agency has already come out and said, well, we've got to double
15 the time that you have to wait to reduce the administrative
16 cost on the agency.

17 I'm finding those two rules together to work serious harm
18 on the asylee's ability to work at all.

19 MS. ANDERSEN: And, Your Honor, I would start again
20 from the premise that explicit in the statute itself it says
21 that no asylee applicant has a right to work, and that's by
22 Congress' mandate and they say that and then they actually put
23 limitations. They, themselves, say 160 days.

24 THE COURT: This is not a right to work. It's an
25 opportunity to work that the agency gives them and with that

1 document that's so critical. So that's the part that -- no
2 right to work doesn't move me. You give the opportunity.

3 MS. ANDERSEN: It's not the right to work. I
4 probably misphrased that. But what Congress did say is that --
5 and I don't have the exact language, but they said that there
6 is no -- it's a discretionary benefit and that is mandated by
7 Congress.

8 And, again, that's just why -- so, you know, Congress has
9 delegated two classes of people, people that have been --
10 received asylum and people who are pending asylum, and it was
11 Congress' prerogative to address that, and they chose that they
12 wanted to separate the process out. They did not want to
13 provide work authorization immediately, and they didn't want to
14 provide it, at a minimum, for six months. And then they gave
15 the complete discretion for the executive agency to figure out
16 the best way to execute that.

17 So while I agree with you the agency has to articulate a
18 reasonable basis for changing its rule before --

19 THE COURT: Right.

20 MS. ANDERSEN: But I think it's not just irrational
21 as a minor policy. So I would just say that that is a rational
22 policy choice. Did they explain it well, I think, is the
23 question under the APA of why they needed it, and I just -- I
24 have a hard time, like, if -- in history we have seen how
25 things have changed. I don't think in 1994, you know, we knew

1 some of the security things that we, you know, dealt with after
2 September 11. We don't know what's going to happen 10 years
3 from now.

4 And, again, there's other areas in immigration law that
5 don't have these same timelines.

6 So you're asking why are we treating, you know, this one
7 benefit, which is a discretionary benefit differently than
8 others. And the *Rosario* is really -- I think that's just to
9 highlight that the agency was required to divert resources. So
10 that is a harm to the agency that if the agency -- it's their
11 prerogative to sort of figure out, you know, where should we
12 sort of divert our sources. And, you know, they comply with
13 the court order, absolutely, but it has, you know, to divert
14 resources.

15 So even an injunction would be extremely harmful for the
16 agency today where they're really facing, you know, a huge
17 crisis ahead of them with funding.

18 THE COURT: Well, and, you know, I can credit
19 everything you say but then it still just doesn't align with no
20 timeline whatsoever. I mean, because taking that to its
21 logical extension, then let's throw out the Federal Rules of
22 Procedure. Why do we need timelines at all? Like, let's just
23 everybody is on the honor system. We don't work that way and
24 government accountability, especially in this context with a
25 20-year history of some accountability, does matter. That's

1 number one.

2 And number two, you're right, you don't -- the agency has
3 to give me a rational basis. I don't have to agree with it but
4 it does have to have some rational basis.

5 And the thing that I struggle with is the agency saw fit
6 repeatedly to tell the public, Don't worry, asylees, you know,
7 we will stay within that 60-day timeline more often than not.
8 It's simply irrational to think that that's relevant to tell
9 asylees and the public when it, at once, shouldn't matter and
10 doesn't matter.

11 And so that's -- you know, that's the part that I'm still
12 really wrestling with when an agency didn't need to do that and
13 they did do it.

14 So in any event, okay, I'm sorry to have to cut this
15 short. This has been extremely helpful. This is what I would
16 like to talk about as next steps. I don't really see how
17 practically we're going to get this done by next Friday, as
18 much as I have tried, but we're still going to move as quickly
19 as I can.

20 So what I propose is this, between now and next Friday,
21 that I give you all an opportunity for simultaneous letter
22 pleadings not to exceed 10 pages each, exclusive of exhibits,
23 if you need exhibits, on the following questions: Standing,
24 the propriety of converting the FVRA/HSA questions, which I
25 think are Counts Four and -- well, you know what counts they

1 are. HSA and FVRA challenges to motions for summary judgment.
2 If so, tell me anything else you wish for me to know with
3 regard to the law; alternatively, if not, tell me what other
4 facts you need that would preclude summary judgment. And then,
5 thirdly, the question of a 705 remedy on the APA. How is it
6 different than 706 or -- not 706 necessarily but the nationwide
7 injunction question that was raised in the CASA case that just
8 came down last week. Those are the three areas that I need
9 additional help from you all on.

10 Talk amongst yourselves. Ms. Andersen, if it turns out
11 that after, you know, talking to your people and looking at
12 this more closely you are not going to make a standing
13 challenge to associational standing or representational
14 standing and you all have narrowed the basis of standing, use
15 your 10 pages on something else, because there's lots of issues
16 here.

17 And if, in fact, you need a little wider berth on either
18 side, just pen me a quick line that says, Judge, we need to
19 exceed the pages because this other issue really does need to
20 be briefed. I'm not going to be unreasonable about it. I'm
21 just trying to cabin that this doesn't get so long and unwieldy
22 that I can't decide it in a timely manner and putting the onus
23 on you all to be as efficient as possible. So that will be
24 simultaneous by next Friday.

25 And then I suggest that we find another time shortly

1 thereafter to get together again so that if there's anything
2 that we didn't address on the APA question, you think I'm
3 getting it all wrong and there are other arguments to be made
4 on the follow-up issues, you have the opportunity to do that.
5 And I would suggest we do that the following week, so that will
6 mean Friday, August 28th.

7 Can you all do a one o'clock follow-up Zoom on Friday,
8 August 28th? Does anyone -- let me do it this way, can anyone
9 not do a follow-up on Friday, August 28th, at one o'clock?

10 (No response.)

11 THE COURT: Okay. Now, I do appreciate that this may
12 result in some push and pull in terms of the effect of these
13 rules, the rules taking effect next week. I just simply see
14 these issues as too important and too in need of further
15 thought and reflection from you all to just pull the trigger
16 before then; but, Plaintiffs, if you have an alternative
17 proposal, let me hear it now and then I've got to run.

18 MS. HIROSE: Sure, Your Honor. Thank you.

19 I just wanted to clarify when I was talking about the 705
20 relief and TRO possibilities earlier, I had meant it could be
21 up until the time that this Court is ready to rule on summary
22 judgment on the issues that are ready for summary judgment. So
23 that could be a very short stay or postponement, which would be
24 different in kind and scope from -- certainly from what the
25 Fourth Circuit was talking about.

1 And, of course, the government, itself, could agree to
2 that kind of remedy. I know that it has happened in other
3 cases, so I'll just throw that out there.

4 THE COURT: I see what you're saying. So you're
5 saying that the stay can be until some resolution on the
6 merits.

7 Now, this may be important for you all then to talk about
8 if you would like to explore do you want this FVRA ruling or
9 don't you, I guess. You know, do you want me to reach the
10 merits on that very critical question that the agency is still
11 dealing with? And if you all resolve that you would prefer to
12 simply press pause on the rules until we work out some of these
13 other issues, you're saying 705 gives you that flexibility, it
14 gives me that flexibility.

15 MS. HIROSE: Yes, absolutely.

16 THE COURT: Got it. All right. Well, then you all
17 talk about it from your perspectives.

18 I still think that a week to resolve all of these issues
19 is what I'm going to need. It doesn't preclude me from
20 exercising 705 authority at any point, right, once I get your
21 briefing on it, simply say we're going to stay the rules
22 effective until I reach the merits?

23 MS. HIROSE: That is our position, that you would
24 still have the authority to do that. I would love to hear from
25 the government if they are in agreement with that, just to make

1 sure.

2 And I guess the other issue is if it would be helpful to
3 have some preliminary briefing before Friday on some of these
4 issues in case Your Honor thinks --

5 THE COURT: Yeah, I think the only -- I think the
6 only one may be the 705 issue, if the government takes a
7 different position that, you know, after the rules take effect,
8 then has the ship sailed. If the government's position is that
9 the rule -- if the rule takes effect, then this whole stay
10 thing is mooted, then maybe we do need that sooner rather than
11 later.

12 Ms. Andersen, do you have a position on that?

13 MS. ANDERSEN: My understanding was that I thought it
14 was the same as the injunction standard. So I'll have to look
15 into that. I'm not aware of the -- of what you're referring
16 to, where that authority is.

17 THE COURT: I think the plaintiffs' position is that
18 they just want to make sure if I give you all until next week,
19 that the government's position isn't going to be, well, Judge,
20 at least, you know, the rules have taken effect, therefore, 705
21 is mooted; it doesn't have any legs anymore because you can't
22 stay it; it's already taken effect.

23 MS. ANDERSEN: Oh, I see. I will get back to the
24 plaintiffs or the Court on that --

25 THE COURT: Okay.

1 MS. ANDERSEN: -- on the answer to that. I don't
2 know the answer to that.

3 THE COURT: All right.

4 So then let's do this. I can make it easier for you all
5 so that -- I've got to look at all of these issues anyway. Why
6 don't you all brief simultaneous three pages, if you need it,
7 the question of 705 by Monday. The remaining questions, as
8 we've laid them out, by Friday. Use your good judgment as to
9 how you want to use your ten-ish pages. You've earned a bit of
10 judicial leniency on that because you really did stick with
11 what I asked you to stick with, and I really do appreciate it.

12 So let's do the first issue, you know, no more than three
13 pages and the rest of it ten-ish pages, and that way, if there
14 is any question, I've got to look at 705 before Friday, then we
15 have your relative positions.

16 Does that work for you all?

17 MS. HIROSE: Thank you, Your Honor.

18 MS. ANDERSEN: Yes.

19 MS. HIROSE: And just to clarify, double-spaced
20 pages?

21 THE COURT: Nope. No, I was actually giving you
22 single-spaced.

23 MS. HIROSE: Oh, single-spaced. Okay.

24 THE COURT: I think it's just a psychological thing
25 for me that when I get a letter and it's only two pages, even

1 though it's single-spaced, it was really four pages. It just
2 makes me feel better.

3 So it's single-spaced.

4 MS. HIROSE: Okay. Thank you. I'm glad you
5 clarified.

6 THE COURT: At least 12-point font, though. Despite
7 my youthful appearance, I cannot read 10-point font.

8 Okay. We'll get a quick letter order out setting the
9 further briefing. Any questions about it before we break for
10 the day?

11 (No response.)

12 THE COURT: Okay, great.

13 Thank you all for your time today. Really helpful.
14 Appreciate it. We'll talk the day I said. I don't have it in
15 front of me, but you all know it. I think it's the 28th at one
16 o'clock.

17 Okay. Take care.

18 MS. ANDERSEN: Thank you.

19 MS. HIROSE: Thank you, Your Honor.

20 MS. AUSTIN: Thank you.

21 THE COURTROOM DEPUTY: This Honorable Court now
22 stands in recess.

23 (Recess taken, 1:30 P.M.)

24

25

1 I, Marlene Martin-Kerr, FCRR, RPR, CRR, RMR, certify that
2 the foregoing is a correct transcript of the stenographic
3 record of proceedings in the above-entitled matter.

4
5 Dated this 17th day of August, 2020.

6 /s/
7 _____
8 Marlene Martin-Kerr
9 Federal Official Court Reporter
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